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1 . . . . .  
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1 . . . . .  
2 . . . . .  
3 to p. 309

3, p. 320 to e

(N.R.) 1 . .

2 . . . . .

Campbell

1 . . . . .  
2 to p. 599

2, p. 600 to e

3 to p. 320 .

3 to end . .

4 to p. 126 .

G. Cooper

Cox

1 . . . . .  
2 . . . . .

Dow

1 & 2 . . .  
3 . . . . .

Jurnford & Mass

1 to 3 . . . . .

4 & 5 . . . . .

6 . . . . .

7 & 8 to p. 403

8, p. 434 to end . . .

Last

1 to p. 110 . . . . .

1, p. 139 to vol. 3, p. 221

2, p. 222 to vol. 5 . . .

6 & 7 . . . . .

8 & 9 . . . . .

10 & 11 to p. 435 . . .

11, p. 436 to vol. 12 . .

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14 from p. 441 to end .

15 . . . . .

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" 8

" 9

" 10

" 11

" 12

" 13

" 14

" 15

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1 to p. 226 . . . . .

1, p. 227 to vol. 2, p. 518

2, p. 524 to vol. 3, p. 299

3, p. 306 to vol. 4 . . .

5 & 6 to p. 576 . . . .

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17 & 18 . . . . .

19 to p. 233 . . . . .

19 from p. 234 to end .

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1 . . . . .

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1 . . . . .

2 . . . . .

3 . . . . .

4 . . . . .

5 . . . . .

6 . . . . .

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102 . . . . .

103 . . . . .

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106 . . . . .

107 . . . . .

108 . . . . .

109 . . . . .

110 . . . . .

111 . . . . .

112 . . . . .

113 . . . . .

114 . . . . .

115 . . . . .

116 . . . . .

117 . . . . .

118 . . . . .

119 . . . . .

120 . . . . .

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123 . . . . .

124 . . . . .

125 . . . . .

126 . . . . .

127 . . . . .

128 . . . . .

129 . . . . .

130 . . . . .

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149 . . . . .

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151 . . . . .

152 . . . . .

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154 . . . . .

155 . . . . .

156 . . . . .

157 . . . . .

158 . . . . .

159 . . . . .

160 . . . . .

161 . . . . .

162 . . . . .

163 . . . . .

164 . . . . .

165 . . . . .

166 . . . . .

167 . . . . .

168 . . . . .

169 . . . . .

170 . . . . .

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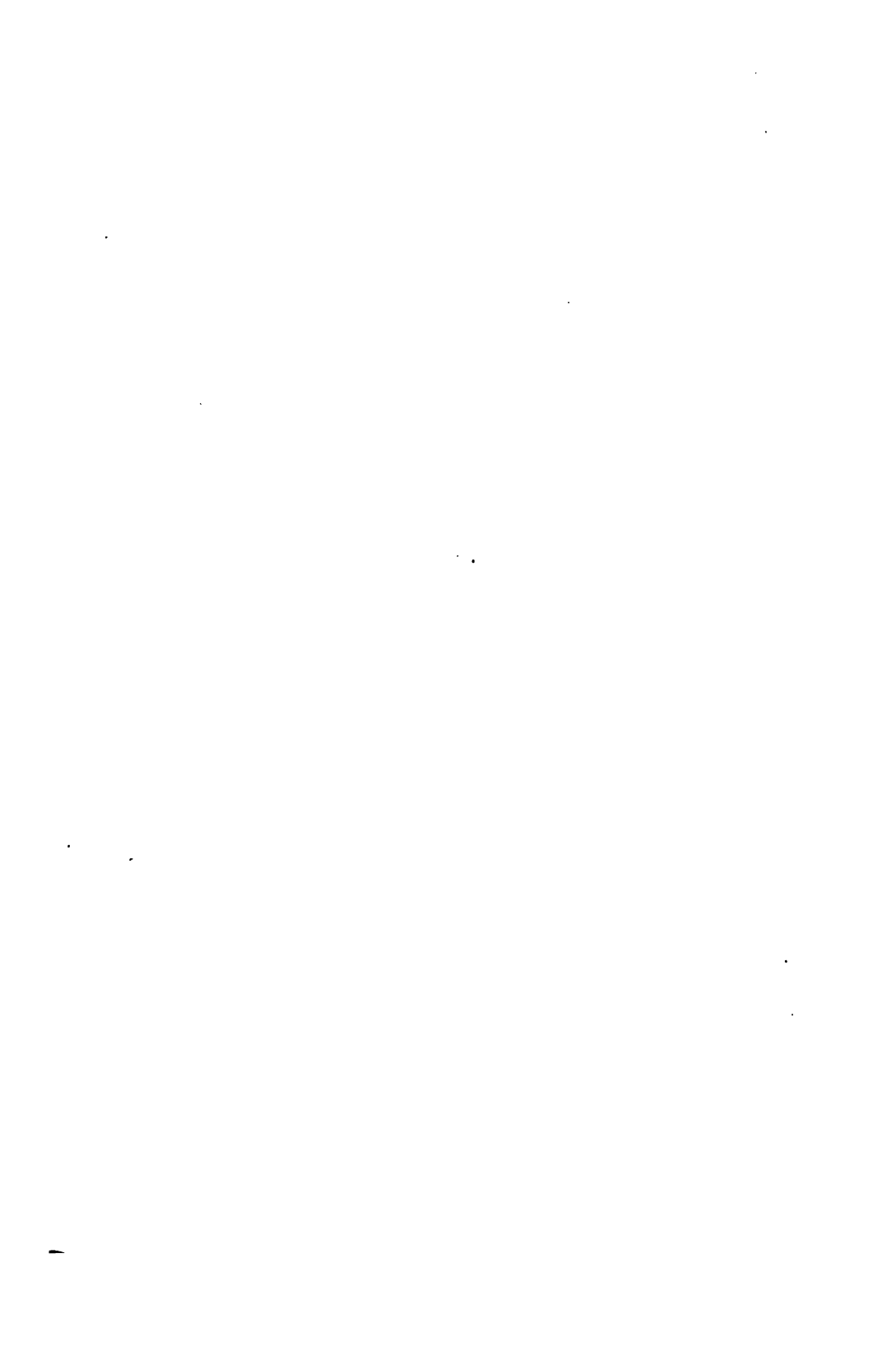
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# THE LAW OF EJECTMENT.





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OR  
RECOVERY OF POSSESSION OF LAND.  
WITH AN  
APPENDIX OF STATUTES AND A FULL INDEX.

BY  
JOHN HERBERT WILLIAMS, LL.B.,  
OF THE MIDDLE TEMPLE,  
AND  
WALTER BALDWIN YATES, B.A.,  
OF THE INNER TEMPLE.

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## PREFACE.

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IT is now forty years since any work upon this subject has appeared, and, in the belief that there is now a want for a modern and concise book upon the subject, the authors have ventured to publish this work, in the hope that it may, to some extent, prove useful to both branches of the profession.

They still adhere to the old term Ejectment, in preference to the new term "Action for the Recovery of Land," which is now used in the Orders and Rules of the Supreme Court, the latter term never having come into general use.

Wishing to make this work as concise as possible, they have purposely omitted to deal with many subjects relating to the law of real property which perhaps might be considered within its scope, and have endeavoured to confine themselves strictly to those points which are most closely connected with an action of ejectment. In the text the provisions of the many statutes which are dealt with are not set out at length, but the actual words of all the more

important statutes are set out in the Appendix, an arrangement which the authors think will commend itself as being most convenient. Where cases are cited a reference to only one report is given, but the Index of Cases gives the reference to all the reports in which each case is to be found.

J. H. WILLIAMS,  
W. B. YATES.

THE TEMPLE,  
*November, 1894.*

# TABLE OF CONTENTS.

---

	PAGE
TABLE AND INDEX OF CASES . . . . .	xi
TABLE OF STATUTES . . . . .	lxv

---

## CHAPTER I.

RIGHT OF ENTRY . . . . .	1
--------------------------	---

## CHAPTER II.

SEVERAL REMEDIES FOR RECOVERY OF POSSESSION . . . . .	5
---	---

## CHAPTER III.

ENTRY . . . . .	9
-----------------	---

## CHAPTER IV.

FORCIBLE ENTRY AND DETAINER . . . . .	13
---------------------------------------	----

## CHAPTER V.

BY LANDLORD AGAINST TENANT . . . . .	25
--------------------------------------	----

## CHAPTER VI.

TERMINATION OF TENANCY . . . . .	35
1. Notice to quit . . . . .	35
2. Demand of possession . . . . .	47
3. Efflux of time . . . . .	49
4. Surrender . . . . .	50
5. Disclaimer . . . . .	51

## CHAPTER VII.

FORFEITURE . . . . .	PAGE 54
----------------------	------------

## CHAPTER VIII.

BREACHES OF COVENANTS AND CONDITIONS . . . . .	71
1. Non-payment of rent . . . . .	71
2. Alienation . . . . .	77
3. Non-repair . . . . .	82
4. User of premises . . . . .	88
5. Waste . . . . .	92
6. Non-insurance . . . . .	94
7. Non-payment of rates and taxes . . . . .	95
8. Bankruptcy . . . . .	100
9. Building covenants . . . . .	101
10. Residence . . . . .	102
11. To buy goods of Lessor . . . . .	102
12. Farming Covenants . . . . .	103
13. Mining covenants . . . . .	104
14. Sundry . . . . .	105

## CHAPTER IX.

WAIVER OF FORFEITURE . . . . .	107
--------------------------------	-----

## CHAPTER X.

RELIEF AGAINST FORFEITURE . . . . .	116
-------------------------------------	-----

## CHAPTER XI.

BY TENANT . . . . .	128
---------------------	-----

## CHAPTER XII.

MORTGAGOR AND MORTGAGEE . . . . .	130
1. By mortgagee against mortgagor and tenants . . . . .	130
2. By mortgagor . . . . .	137
3. Staying proceedings . . . . .	138

## CHAPTER XIII.

BY TENANT BY ELEGIT AND PURCHASE UNDER FL. FA. . . . .	145
--	-----

## CHAPTER XIV.

1. By devisee . . . . .	151
2. By legatee . . . . .	161
3. By executors and administrators . . . . .	162



## TABLE OF CONTENTS.

ix

### CHAPTER XV.

BY HEIR-AT-LAW . . . . .	PAGE 164
--------------------------	-------------

### CHAPTER XVI.

1. By trustee of bankrupt . . . . .	171
2. By grantee of rent-charge . . . . .	173
3. By guardian of infant . . . . .	175
4. By infant . . . . .	176
5. By lunatic and person of unsound mind . . . . .	177
6. By joint tenants, tenants in common, and co-parceners . . . . .	177
7. By parson . . . . .	178
8. By churchwardens and overseers . . . . .	180

### CHAPTER XVII.

COPYHOLDS . . . . .	184
---------------------	-----

### CHAPTER XVIII.

WHAT PERSONS CAN BE SUED . . . . .	189
------------------------------------	-----

### CHAPTER XIX.

MESNE PROFITS . . . . .	190
-------------------------	-----

### CHAPTER XX.

STATUTES OF LIMITATIONS . . . . .	193
-----------------------------------	-----

### CHAPTER XXI.

EVIDENCE . . . . .	227
1. Ownership . . . . .	227
2. Notice to quit . . . . .	230
3. Breach of covenant or condition . . . . .	231
4. Assignment or sub-letting . . . . .	232
5. Distress . . . . .	232
6. Insufficient distress . . . . .	232
7. Eviction . . . . .	233
8. Vacant possession . . . . .	234
9. Assent of executor to bequest of leaseholds . . . . .	235
10. Sunrise and sunset . . . . .	235
11. Authority of agent . . . . .	236
12. Elegit . . . . .	236
13. Copyholds . . . . .	237

	PAGE
14. Title of parson . . . . .	237
15. Title of churchwardens . . . . .	238
16. Wills of lands . . . . .	238
17. Heirship . . . . .	240
18. Deeds and documents . . . . .	247
19. Award . . . . .	251

## CHAPTER XXII.

PRACTICE IN THE HIGH COURT . . . . .	253
--------------------------------------	-----

## CHAPTER XXIII.

ACTION IN THE COUNTY COURT . . . . .	268
1. Ordinary action for the recovery of land . . . . .	268
2. Action by landlord to recover possession . . . . .	274

## CHAPTER XXIV.

SUMMARY PROCEEDINGS BEFORE JUSTICES . . . . .	281
1. Landlord against tenant . . . . .	281
2. Deserted premises . . . . .	283
3. Sundry other cases . . . . .	285

## APPENDIX A.

## FORMS.

NOTICE TO QUIT . . . . .	287
1. By landlord . . . . .	287
2. By tenant . . . . .	287
3. By tenant in common (landlord); notice of owner's intention to apply to justices to recover possession . . . . .	288
STATEMENT OF CLAIM . . . . .	288
1. Landlord against tenant . . . . .	288
2. Heir-at-law against stranger . . . . .	289
NOTICE LIMITING DEFENCE . . . . .	289
1. In the high court . . . . .	289
2. In the county court . . . . .	289
APPLICATION EX PARTE BY LANDLORD FOR LEAVE TO DEFEND	290

## APPENDIX B.

STATUTES . . . . .	290
--------------------	-----

INDEX . . . . .	375
-----------------	-----

## TABLE AND INDEX OF CASES.

	PAGE
Abergavenny v. Brace, L. R. 7 Ex. 145 ; 41 L. J. Ex. 120 ; 26 L. T. 514 ; 20 W. R. 462 . . . . .	198, 212, 214
Accidental Soc. v. Mackenzie, 5 L. T. 20 ; 9 W. R. 783 . . . . .	29
Acocks v. Phillips, 5 H. & N. 183 . . . . .	75
Adam v. Kerr, 1 B. & P. 360 . . . . .	247
Adnam v. Sandwich, 2 Q. B. D. 485 ; 46 L. J. Q. B. 612 . . . . .	194, 198
Agar v. Young, Car. & M. 78 . . . . .	27, 32
Ahearn v. Bellman, 4 Ex. D. 201 ; 48 L. J. Ex. 681 ; 40 L. T. 771 ; 27 W. R. 928 . . . . .	44
Alchorne v. Gomme, 2 Bing. 54 ; 9 Moore, 130 . . . . .	28, 136
Alderman v. Neate, 4 M. & W. 704 ; 1 H. & H. 369 ; 3 Jur. 171 . . . . .	130
Alderson v. White, 2 De G. & J. 97 ; 4 Jur. N. S. 125 . . . . .	220
Aldridge v. Howard, 5 Scott, N. R. 623 ; 4 M. & Gr. 921 . . . . .	104
— v. Ferne, 17 Q. B. D. 212 ; 55 L. J. Q. B. 587 ; 34 W. R. 578 . . . . .	99
Alford v. Vickery, Car. & M. 280 . . . . .	42
Alison, Re, 11 Ch. D. 284 ; 40 L. T. 234 ; 27 W. R. 537 . . . . .	218, 220, 224
Allason v. Stark, 9 A. & E. 255 ; 1 P. & D. 183 . . . . .	180, 181
Allen v. Kennet, 24 W. R. 845 . . . . .	262
— v. Woods, 68 L. T. 143 . . . . .	2
Allum v. Dickinson, 9 Q. B. D. 632 ; 52 L. J. Q. B. 190 ; 47 L. T. 493 ; 30 W. R. 830 ; 46 J. P. 262 ; 47 Id. 102 . . . . .	96, 99
Alston, Re [1892], Prob. 142 ; 61 L. J. Prob. 92 ; 66 L. T. 591. . . . .	242
Ames v. Mannering, 26 Beav. 583 . . . . .	221
Amfield v. White, Ry. & M. 246 . . . . .	97
Amis v. Lloyd, 3 V. & B. 15 . . . . .	142
Anderson v. Midland Ry. Co., 3 E. & E. 614 ; 30 L. J. Q. B. 94 ; 3 L. T. 809 ; 7 Jur. N. S. 411 . . . . .	132
— v. Pignet, 8 Ch. 180 ; 42 L. J. Ch. 310 ; 27 L. T. 740 ; 21 W. R. 150 . . . . .	4
Andrew v. Motley, 12 C. B. N. S. 514 ; 32 L. J. C. P. 123 . . . . .	239
Andrews v. Hailes, 2 E. & B. 349 ; 22 L. J. Q. B. 409 . . . . .	33
Anglo-Italian Bank v. Davies, 9 Ch. D. 275 ; 47 L. J. Ch. 833 ; 39 L. T. 244 ; 27 W. R. 3 . . . . .	145, 149, 150
Anon., 3 Salk. 169 . . . . .	19, 22
Appleton v. Morrey, 8 W. R. 653 ; 2 F. & F. 167 . . . . .	182
Archbold v. Scully, 9 H. L. C. 360 ; 5 L. T. 160 ; 7 Jur. N. S. 1169 . . . . .	206, 217

	PAGE
Archer v. Snapp, And. 342; 2 Stra. 1107 . . . . .	140, 141
Arden v. Boyce, 10 Times R. 253 . . . . .	260
— v. —, [1894] 1 Q. B. 796; 63 L. J. Q. B. 338; 70 L. T. 480; 42 W. R. 354; 38 S. J. 324 . . . . .	253, 254
Arnison, <i>Ex parte</i> , L. R. 3 Ex. 56; 37 L. J. Ex. 57 . . . . .	233
Arnsby v. Woodward, 6 B. & C. 519; 9 D. & R. 536 . . . . .	60, 108
Ashcroft v. Bourne, 3 B. & Ad. 684 . . . . .	283, 285
Asher v. Whitlock, L. R. 1 Q. B. 1; 35 L. J. Q. B. 17; 14 W. R. 26; 11 Jur. N. S. 925 . . . . .	153, 199, 227
Ashtown v. Larke, 6 Ir. R. C. L. 270 . . . . .	38
Aslin v. Parkin, 2 Burr. 665; 2 Ken. 376 . . . . .	191
Astley v. Essex, 18 Eq. 290; 43 L. J. Ch. 817; 30 L. T. 435; 22 W. R. 620 . . . . .	203
Atchley v. Sprigg, 33 L. J. Ch. 345; 10 L. T. 16; 12 W. R. 364; 10 Jur. N. S. 144 . . . . .	243, 244
A.-G. v. Churchill, 8 M. & W. 171 . . . . .	7
— v. Davey, 4 De G. & J. 136 . . . . .	225
— v. Flint, 4 Hare, 147 . . . . .	214
— v. Lewin, 1 Cooper Ch. 51; 8 Sim. 366 . . . . .	180, 181
— v. Magdalen College, 18 Beav. 223; 23 L. J. Ch. 844; 18 Jur. 363 . . . . .	215
— v. Parsons, 2 M. & W. 23; 2 Gale, 227; 5 Dowl. 165 . . . . .	7
— v. Stephens, 6 De G. M. & G. 111; 25 L. J. Ch. 888; 2 Jur. N. S. 51 . . . . .	206
— v. Tomline, 5 Ch. D. 750; 15 <i>Id.</i> 150; 46 L. J. Ch. 654; 36 L. T. 684; 43 <i>Id.</i> 486; 25 W. R. 803 . . . . .	196
Attoe v. Hemmings, 2 Bulstr. 281 . . . . .	62
Attwood v. Jolliffe, 3 New Sess. Cas. 116 . . . . .	20
Austin v. Llewellyn, 9 Exch. 276; 2 C. L. R. 408; 23 L. J. Ex. 11. 212	
Auworth v. Johnson, 5 C. & P. 239 . . . . .	94
Aylesford Peerage, 11 App. Cas. 1 . . . . .	243, 245, 246
Badcock v. Hunt, 22 Q. B. D. 145; 58 L. J. Q. B. 134; 60 L. T. 314; 37 W. R. 205; 53 J. P. 340. . . . .	97, 100
Baddely v. Denton, 1 L. M. & P. 172 . . . . .	268
Bagot v. Bagot, 32 Beav. 509; 33 L. J. Ch. 116; 9 L. T. 217; 12 W. R. 35; 9 Jur. N. S. 1022 . . . . .	93
Bailey v. Mason, 2 Ir. C. L. R. 582 . . . . .	213
Baily v. de Crespigny, L. R. 4 Q. B. 180; 38 L. J. Q. B. 98; 19 L. T. 681; 17 W. R. 494 . . . . .	59, 81
Bain v. Mason, 1 C. & P. 202 . . . . .	241, 242
Baines v. Lumley, 16 W. R. 674 . . . . .	198, 206
Baker v. Gostling, 4 Moo. & S. 539; 1 B. N. C. 19 . . . . .	79
— v. Greenhill, 3 Q. B. 148; 2 G. & D. 435; 6 Jur. 710 . . . . .	96
— v. Wetton, 14 Sim. 426; 9 Jur. 98 . . . . .	218
Balkis, <i>Re</i> , 58 L. T. 300; 36 W. R. 392 . . . . .	249
Ball v. Cullimore, 2 C. M. & R. 120; 1 Gale, 96; 5 Tyr. 753 . . . . .	47

	PAGE
Ball v. Dinsterville, 4 T. R. 313; 2 R. R. 394 . . . . .	249
Bally v. Wells, 3 Wils. 25 . . . . .	65
Bamford v. Creasy, 3 Giff. 675; 8 Jur. N. S. 1147; 7 L. T. 187, 10 W. R. 856 . . . . .	116, 127
Banbury Peerage, 1 S. & St. 153 . . . . .	243, 244
Bangham, <i>Re</i> , 1 P. D. 429; 45 L. J. P. 80 . . . . .	156
Banks v. Rebbeck, L. M. & P. 452; 20 L. J. Q. B. 476; 24 W. R. 712; 15 Jur. 659 . . . . .	274
Barber v. Brown, 1 C. B. N. S. 121; 26 L. J. C. P. 41; 3 Jur. N. S. 18. 192	
Barcroft v. Welland, 12 L. R. Ir. 35 . . . . .	96
Bargent v. Thomson, 4 Giff. 473; 9 Jur. N. S. 1192; 9 L. T. 365 . 116, 127	
Baring v. Abingdon [1892], 2 Ch. 374; 67 L. T. 6; 41 W. R. 22 . . 51	
Barker v. Palmer, 8 Q. B. D. 9; 51 L. J. Q. B. 110; 45 L. T. 480; 30 W. R. 59 . . . . .	270
Barlow v. Teal, 15 Q. B. D. 403, 501; 54 L. J. Q. B. 400, 564; 53 L. T. 52; 54 <i>Id.</i> 63; 34 W. R. 54; 50 J. P. 100 . . . . .	36, 37
Barnes v. Trompowsky, 7 T. R. 265 . . . . .	247
Barnett v. Guildford, 11 Exch. 19; 24 L. J. Ex. 281; 1 Jur. N. S. 1142 . . . . .	190, 191
Barraclough v. Greenhough, L. R. 2 Q. B. 612; 8 B. & S. 623; 36 L. J. Q. B. 251; 15 W. R. 934 . . . . .	240
Barrett v. Barrett, Hetley, 34 . . . . .	93
— v. Bedford, 8 T. R. 602 . . . . .	99
Barrow v. Isaacs [1891], 1 Q. B. 417; 60 L. J. Q. B. 179; 64 L. T. 686; 39 W. R. 338; 55 J. P. 517 . . . . .	58, 79, 116, 118, 127
Barry v. Glover, 10 Ir. C. L. R. 118 . . . . .	59, 72, 76
Barton v. Dawes, 10 C. B. 261; 19 L. J. C. P. 302 . . . . .	230
Barwick v. Thompson, 7 T. R. 488; 4 R. R. 499 . . . . .	27, 28
Baspole v. Long, Cro. Eliz. 879; Noy, 42 . . . . .	185
Bastard v. Clarke, 7 Ves. 489 . . . . .	141
Basten v. Carew, 3 B. & C. 649; 5 D. & R. 558 . . . . .	283, 284, 285
Batchelor v. Bigger, 60 L. T. 416 . . . . .	99
Bath's Case, 6 Co. Rep. 34 b. . . . .	181
Baylis v. Le Gros, 4 C. B. N. S. 537; 4 Jur. N. S. 518 . . . . .	67, 68, 87
Beade v. Orme, Noy. 136 . . . . .	14, 15
Beamish v. Cox, 16 L. R. Ir. 270, 458 . . . . .	37
Beardman v. Wilson, L. R. 4 C. P. 57; 38 L. J. C. P. 91; 19 L. T. 282; 17 W. R. 54 . . . . .	60, 79
Beasney, <i>Re</i> , 7 Eq. 498; 38 L. J. Ch. 159; 19 L. T. 630 . . . . .	242
Beattie v. Mair, 10 L. R. Ir. 208 . . . . .	13
Beaufort v. Bates, 3 De G. F. & J. 381; 31 L. J. Ch. 481; 6 L. T. 82; 10 W. R. 200 . . . . .	85
— v. Neeld, 12 Cl. & F. 248 . . . . .	127
Beckett v. Bradley, 7 M. & Gr. 994; 8 Scott N. R. 843; 2 D. & L. 586; 14 L. J. C. P. 3; 5 L. T. 382 . . . . .	27
Beckford v. Wade, 17 Ves. 89; 13 R. R. 20 . . . . .	214, 217
Beddall v. Maitland, 17 Ch. D. 174; 50 L. J. Ch. 401; 44 L. T. 248; 29 W. R. 484 . . . . .	10, 13, 18

	PAGE
Bedell v. Constable, Vaugh. 177 . . . . .	175
Bedford v. Bedford, 7 Exch. 777 ; 21 L. J. M. C. 225 . . . . .	96, 97
Begbie v. Crook, 2 B. N. C. 70 ; 2 Scott, 128 . . . . .	161
Belaney v. Kelly, 24 L. T. 738 ; 19 W. R. 1171 . . . . .	50
Belbin v. Skeats, 1 Sw. & Tr. 148 ; 27 L. J. Prob. 56 . . . . .	239
Belcher v. McIntosh, 8 C. & P. 720 ; 2 M. & Rob. 186 . . . . .	82, 83
Benham, <i>Re</i> , 4 Eq. 416 ; 36 L. J. Ch. 502 ; 16 L. T. 349 ; 15 W. R. 741 . . . . .	242
Bennett v. Herring, 3 C. B. N. S. 370 . . . . .	64, 86, 113
— v. Womack, 7 B. & C. 627 ; 1 M. & Ry. 644 ; 3 C. & P. 96 . . . . .	65
Berkeley Peerage, 4 Camp. 401 ; 14 R. R. 782 . . . . .	245, 246
Bernett v. Taylor, 9 Ves. 381 . . . . .	247
Berney v. Bickmore, 8 L. T. 353 . . . . .	84
— v. Read, 7 Q. B. 79 ; 14 L. J. Q. B. 247 ; 9 Jur. 620 . . . . .	251
Berrey v. Lindley, 3 M. & Gr. 498 ; 5 Jur. 1061 ; 4 Scott N. R. 61 . . . . .	38
Berry v. Banner, 1 Peake, 212 ; 3 R. R. 674 . . . . .	238
— v. Taunton, Cro. Eliz. 331 . . . . .	81
Bessell v. Landsberg, 7 Q. B. 638 ; 9 Jur. 576 ; 14 L. J. Q. B. 355 . . . . .	50
Bickley v. Bickley, 4 Eq. 216 ; 36 L. J. Ch. 817 . . . . .	164, 165, 169
Biederman v. Seymour, 3 Beav. 368 ; 10 L. J. Ch. 177 ; 2 Myl. & Cr. 117 . . . . .	165
Bikker v. Beeston, 1 F. & F. 685 . . . . .	228
Birch v. Wright, 1 T. R. 378 ; 1 R. R. 223 . . . . .	35, 130, 133
Bird v. Defouvielle, 2 C. & K. 415 . . . . .	44
— v. Elwes, L. R. 3 Ex. 225 ; 37 L. J. Ex. 91 ; 18 L. T. 727 ; 16 W. R. 1120 . . . . .	99
Birt v. Barlow, 1 Doug. 170 . . . . .	242
Birtwhistle v. Vardill, 7 Cl. & F. 895 ; 9 Bligh, 32 ; 6 B. N. C. 385 ; 4 Jur. 1076 ; 1 Scott N. R. 828 . . . . .	168
Bissell v. Williamson, 7 H. & N. 396 . . . . .	275
Blades v. Higga, 10 C. B. N. S. 718 ; 30 L. J. C. P. 347 ; 4 L. T. 551 ; 7 Jur. N. S. 1289 . . . . .	10, 11
Blake v. Foster, 8 T. R. 487 ; 5 R. R. 419 . . . . .	28, 31
— v. Leigh, Amb. 305 . . . . .	175
Blandford v. Marlborough, 2 Atk. 541 . . . . .	96
Blight v. Hartnoll, 19 Ch. D. 294 ; 51 L. J. Ch. 162 ; 45 L. T. 524 ; 30 W. R. 513 . . . . .	153
Blyth v. Deunnett, 13 C. B. 178 ; 22 L. J. C. P. 79 . . . . .	45, 110
Board v. Board, L. R. 9 Q. B. 48 ; 43 L. J. Q. B. 4 ; 29 L. T. 459 ; 22 W. R. 206 . . . . .	199
Bolling v. Hobday, 31 W. R. 9 . . . . .	224
Bolton v. Tomlin, 5 A. & E. 856 ; 1 N. & P. 247 . . . . .	56
Bond v. Freke, W. N. 1884, p. 47 . . . . .	126
Bonsor and Smith, <i>Re</i> , 34 Ch. D. 560 note . . . . .	200
Booth v. Booth, 2 Atk. 342 . . . . .	139
Borgnis v. Edwards, 2 F. & F. 111 . . . . .	85
Borrows v. Ellison, L. R. 6 Ex. 128 ; 40 L. J. Ex. 131 ; 24 L. T. 365 ; 19 W. R. 850 . . . . .	211

TABLE AND INDEX OF CASES.

XV

	PAGE
Bosville v. A.-G., 12 P. D. 177; 56 L. J. Prob. 97; 57 L. T. 88; 36 W. R. 79 . . . . .	243, 244
Bowen v. Anderson [1894], 1 Q. B. 164; 42 W. R. 236 . . . . .	37
Bowes v. Law, 9 Eq. 636; 39 L. J. Ch. 483; 22 L. T. 267; 18 W. R. 640 . . . . .	102
Bowker v. Burdekin, 11 M. & W. 128; 12 L. J. Ex. 329 . . . . .	249
Bowman v. Hodgson, L. R. 1 P. & M. 362; 36 L. J. Prob. 124; 16 L. T. 392 . . . . .	239, 247
Bowser v. Colby, 1 Hare, 109; 11 L. J. Ch. 182 . . . . .	108
Boyes v. Cook, 14 Ch. D. 58; 49 L. J. Ch. 350; 42 L. T. 556; 28 W. R. 754 . . . . .	158
Bradbury v. Wright, 2 Doug. 624 . . . . .	96, 97
Brain, <i>Re</i> , 10 Eq. 389; 44 L. J. Ch. 103; 31 L. T. 17; 22 W. R. 867 . . . . .	54, 119, 124
Bramwell v. Lacy, 10 Ch. D. 691; 48 L. J. Ch. 339; 40 L. T. 361; 27 W. R. 463 . . . . .	89
Brandreth v. Shears, W. N. 1883, p. 89 . . . . .	261
Brasington v. Llewellyn, 27 L. J. Ex. 297; 1 F. & F. 27 . . . . .	224
Bray v. Fogarty, 1r. Rep. 4 Eq. 544 . . . . .	58, 92, 101
Brazier v. Jones, 8 B. & C. 124 . . . . .	251
Breton v. Cope, 1 Peake, 43 . . . . .	247
Brewer v. Eaton, 3 Doug. 230; 6 T. R. 220 . . . . .	76, 110
— v. Hill, 2 Anstr. 413; 3 R. R. 596 . . . . .	79
Brewster v. Kitchell, 1 Salk. 197 . . . . .	59, 96, 97, 98
Bridge v. Quicke, 67 L. T. 54 . . . . .	126
Bridges v. Longman, 24 Beav. 27 . . . . .	112
— v. Potts, 17 C. B. N. S. 314; 33 L. J. C. P. 338; 11 L. T. 373; 10 Jur. N. S. 1049 . . . . .	35, 36
Brierly v. Kendall, 17 Q. B. 937; 21 L. J. Q. B. 161 . . . . .	131
Brighton (Mayor) v. Brighton (Guardians), 5 C. P. D. 368; 49 L. J. C. P. 648; 44 J. P. 683 . . . . .	205
Bringloe v. Goodson, 4 B. N. C. 726; 6 Scott, 502; 8 <i>Id.</i> 71; 5 B. N. C. 738 . . . . .	248
Bristol v. Jones, 1 K. & E. 484; 28 L. J. Q. B. 201; 5 Jur. N. S. 956; 7 W. R. 307 . . . . .	86
— v. Westcott, 12 Ch. D. 461; 41 L. T. 117; 27 W. R. 841 . . . . .	79
Brocklebank, <i>Ex parte</i> , 6 Ch. D. 358; 46 L. J. Bank. 113; 37 L. T. 282; 25 W. R. 859 . . . . .	176
Brook v. Biggs, 2 B. N. C. 572; 2 Scott, 803 . . . . .	31
Brookes v. Drysdale, 3 C. P. D. 52; 37 L. T. 467; 26 W. R. 331 . . . . .	55
Brown's Case, 4 Co. Rep. 21a . . . . .	184
Brown, <i>Re</i> , 1 K. & J. 522 . . . . .	157
— v. Armstrong, 7 Ir. Rep. C. L. 130 . . . . .	229
— v. Brown, 8 E. & B. 876; 27 L. J. Q. B. 173; 4 Jur. N. S. 163 . . . . .	239
— v. Burtinshaw, 7 D. & R. 603 . . . . .	36
— v. Cocking, L. R. 3 Q. B. 672; 37 L. J. Q. B. 250; 18 L. T. 560; 16 W. R. 933; 9 B. & S. 503 . . . . .	269, 275

	PAGE
<i>Browne v. Cork</i> , 1 Dr. & Wal. 700 . . . . .	218
— <i>v. Dawson</i> , 12 A. & E. 624; 4 P. & D. 355 . . . . .	10, 11
— <i>v. Radford</i> , W. N. 1874, p. 124 . . . . .	214
— <i>v. Storey</i> , 1 M. & Gr. 117; 1 Scott N. R. 9; 4 Jur. 319 . . . . .	184
<i>Browning v. Beston's Case</i> , Plow. 180 . . . . .	59, 107
<i>Brudnel's Case</i> , 5 Co. Rep. 9 a . . . . .	50
<i>Bryan v. Cowdal</i> , 21 W. R. 693 . . . . .	224
<i>Brydges v. Lewis</i> , 3 Q. B. 603; 2 G. & D. 763; 6 Jur. 837 . . . . .	61
<i>Bubb v. Yelverton</i> , 10 Eq. 465 . . . . .	93
<i>Buckland v. Gibbins</i> , 32 L. J. Ch. 391; 9 Jur. N. S. 781; 8 L. T. 129; 11 W. R. 483 . . . . .	32
<i>Buckle v. Fredericks</i> , 44 Ch. D. 244; 62 L. T. 884; 38 W. R. 742; 55 J. P. 165 . . . . .	90, 91
<i>Buckley v. Buckley</i> , 1 T. R. 647; 1 R. R. 338 . . . . .	255
— <i>v. Pirk</i> , 1 Salk, 318 . . . . .	64, 81
<i>Buckworth v. Simpson</i> , 1 C. M. & R. 834; 5 Tyr. 344; 1 Gale, 38 . . . . .	61
<i>Budd v. Marshall</i> , 5 C. P. D. 481; 50 L. J. Q. B. 24; 42 L. T. 149, 793; 29 W. R. 148; 44 J. P. 584 . . . . .	99
<i>Buller v. Burt</i> , 4 A. & E. 15, <i>cited</i> . . . . .	239
<i>Bullock v. Bennett</i> , 24 L. J. Ch. 512 . . . . .	154
— <i>v. Donmitt</i> , 2 Chit. 608; 6 T. R. 650; 3 R. R. 300 . . . . .	84
<i>Burdett v. Withers</i> , 7 A. & E. 136; 2 N. & P. 122; 1 Jur. 514 . . . . .	82, 83
<i>Burgaine v. Spurling</i> , Cro. Car. 283 . . . . .	72
<i>Burgess v. Boetsfeur</i> , 7 M. & Gr. 481; 8 Jur. 621; 18 L. J. M. C. 122; 8 Scott N. R. 194 . . . . .	84
<i>Burke v. Prior</i> , 15 Ir. Ch. Rep. 106 . . . . .	116, 127
<i>Burling v. Read</i> , 11 Q. B. 904 . . . . .	11
<i>Burn v. Phelps</i> , 1 Stark. 94 . . . . .	234
<i>Burnaby v. Baillie</i> , 61 L. T. 634 . . . . .	244
<i>Burne v. Richardson</i> , 4 Taunt. 720; 14 R. R. 647 . . . . .	192
<i>Burns v. Walford</i> , W. N. 1884, p. 31 . . . . .	253
<i>Burroughs v. M'Creight</i> , 1 J. & L. 290; 7 Ir. Eq. Rep. 49; 2 Con. & L. 94 . . . . .	208, 209, 214, 216
<i>Burrowes v. Gradin</i> , 1 D. & L. 213; 12 L. J. Q. B. 333; 7 Jur. 942 . . . . .	138
<i>Bursill v. Tanner</i> , 16 Q. B. D. 1; 55 L. J. Q. B. 53; 53 L. T. 445; 34 W. R. 35 . . . . .	251
<i>Burt v. Gray</i> [1891], 2 Q. B. 98; 60 L. J. Q. B. 664; 65 L. T. 229; 39 W. R. 429 . . . . .	124
<i>Burton v. Dickenson</i> , 17 L. T. 264 . . . . .	133
<i>Bushby v. Dixon</i> , 3 B. & C. 298; 5 D. & R. 126 . . . . .	206
<i>Buskin v. Edmunds</i> , Cro. Eliz. 415 . . . . .	74
<i>Butcher v. Butcher</i> , 7 B. & C. 399; 1 N. R. 113; 1 M. & Ry. 220 . . . . .	9, 10
<i>Bute v. Thompson</i> , 13 M. & W. 487; 14 L. J. Ex. 95 . . . . .	105
<i>Butler v. Butler</i> , 23 Ch. D. 66; 54 L. J. Ch. 197; 52 L. T. 90; 33 W. R. 192 . . . . .	158
— <i>v. Meredith</i> , 11 Exch. 85; 1 Jur. N. S. 451; 24 L. J. Ex. 239 . . . . .	257
— <i>v. Mountgarret</i> , 7 H. L. C. 633 . . . . .	246



	PAGE
CADBY <i>v.</i> Martinez, 11 A. & E. 720; 3 P. & D. 386 . . . . .	85
Camoy's Peerage, 6 Cl. & F. 789 . . . . .	246
Campbell <i>v.</i> Campbell, L. R. 1 H. L. Sc. 182 . . . . .	142
— <i>v.</i> Loader, 3 H. & C. 520; 34 L. J. Ex. 50; 11 L. T. 608; . . . . .	
11 Jur. N. S. 286; 13 W. R. 348 . . . . .	277
Cann <i>v.</i> Taylor, 1 F. & F. 651 . . . . .	221
Cannon <i>v.</i> Rimington, 12 C. B. 1, 18; 21 L. J. C. P. 187; 22 <i>id.</i> 153 . . . . .	213
Carew <i>v.</i> Christopher, 8 L. R. Ir. 252; 10 <i>id.</i> 38 . . . . .	263
Carne <i>v.</i> Nicoll, 1 B. N. C. 430; 1 Scott, 466 . . . . .	229
Carpenter <i>v.</i> Colins, Yelv. 73 . . . . .	48
— <i>v.</i> Parker, 3 C. B. N. S. 206; 27 L. J. C. P. 78 . . . . .	234
Carrick <i>v.</i> Ford, 4 Ch. 247; 38 L. J. Ch. 671; 20 L. T. 289; 17 W. R. 478 . . . . .	172
Cartwright, <i>Re</i> , 41 Ch. D. 532; 38 L. J. Ch. 590; 60 L. T. 891; 87 W. R. 612 . . . . .	94
Casey <i>v.</i> Hellyer, 17 Q. B. D. 97; 55 L. J. Q. B. 207; 54 L. T. 103; 34 W. R. 337 . . . . .	253
Caulfield <i>v.</i> Farr, Ir. R. 7 C. L. 469 . . . . .	49
Chadwick <i>v.</i> Broadwood, 3 Beav. 308; 10 L. J. Ch. 242; 5 Jur. 359 . . . . .	198, 206
Chaloner <i>v.</i> Bolcklow, 3 App. Cas. 933; 39 L. T. 134; 47 L. J. Q. B. 562; 26 W. R. 541 . . . . .	98
Chaplin <i>v.</i> Reid, 1 F. & F. 315 . . . . .	231
Chapman <i>v.</i> Beard, 3 Anstr. 942; 4 R. R. 875 . . . . .	179, 238
— <i>v.</i> Beecham, 3 Q. B. 723; 3 G. & D. 71; 12 L. J. Q. B. 42; 6 Jur. 968 . . . . .	132
— <i>v.</i> Corpe, 27 W. R. 781; 41 L. T. 22 . . . . .	218, 224
Charity Commissioners <i>v.</i> Wybrants, 2 J. & L. 182 . . . . .	216
Chatfield <i>v.</i> Parker, 3 B. & C. 543; 2 M. & Ry. 540 . . . . .	147
— <i>v.</i> Berchtoldt, 7 Ch. 192; 41 L. J. Ch. 255; 26 L. T. 267; 20 W. R. 401 . . . . .	152
Cherry <i>v.</i> Heming, 4 Exch. 631; 19 L. J. Ex. 63 . . . . .	248
Chesterfield <i>v.</i> Bolton, 2 Comyn, 627 . . . . .	84
Chetham <i>v.</i> Hoare, 9 Eq. 571; 39 L. J. Ch. 376; 22 L. T. 57 . . . . .	217
Chew <i>v.</i> Holroyd, 8 Exch. 249; 22 L. J. Ex. 95 . . . . .	268
Chilcote <i>v.</i> Youldon, 3 E. & E. 7; 29 L. J. M. C. 197; 2 L. T. 370; 6 Jur. N. S. 1054; 8 W. R. 559 . . . . .	286
Child <i>v.</i> Douglas, 5 De G. M. & G. 739; Kay, 560; 2 Jur. N. S. 950; 2 W. R. 461 . . . . .	102
Chinnery <i>v.</i> Evans, 11 H. L. C. 115; 11 L. T. 68; 10 Jur. N. S. 855; 13 W. R. 20 . . . . .	221, 222
Cholmeley's School <i>v.</i> Sewell, [1893] 2 Q. B. 254; 62 L. J. Q. B. 476; 69 L. T. 188; 41 W. R. 637; 57 J. P. 680; 5 R. 501 . . . . .	126
Christie <i>v.</i> Ovington, 1 Ch. D. 279; 24 W. R. 204 . . . . .	169
Christ's Hospital <i>v.</i> Harrild, 2 M. & Gr. 707; 3 Scott, N. R. 126 . . . . .	97
Church <i>v.</i> Brown, 15 Ves. 258; 10 R. R. 74 . . . . .	77, 79
Churcher <i>v.</i> Martin, 42 Ch. D. 812; 58 L. J. Ch. 586; 61 L. T. 113; 37 W. R. 682 . . . . .	214

	PAGE
Claridge v. Mackenzie, 4 M. & Gr. 143; 4 Scott, N. R. 796 . . . . .	32
Clark v. Adie (No. 2), 2 App. Cas. 423; 46 L. J. Ch. 598; 37 L. T. 1; 26 W. R. 47 . . . . .	29, 33
— v. Glasgow Co., 1 Macq. 668 . . . . .	84
Clarke v. Arden, 16 C. B. 227; 24 L. J. C. P. 162; 1 Jur. N. S. 710; 3 C. L. R. 81 . . . . .	184, 186
— v. Clarke, Ir. Rep. 2 C. L. 895 . . . . .	199, 211
Clegg v. Hands, 44 Ch. D. 503; 59 L. J. Ch. 477; 62 L. T. 502; 33 W. R. 433. See Addendum. . . . .	
— v. Rowland, 2 Eq. 160; 35 L. J. Ch. 396; 14 L. T. 217; 14 W. R. 530 . . . . .	93
Clifford v. Watts, L. R. 5 C. P. 577; 40 L. J. C. P. 86; 22 L. T. 717; 18 W. R. 925 . . . . .	105
Clifton v. Molineux, 4 Co. Rep. 27 a. . . . .	185
Clowes v. Hughes, L. R. 5 Ex. 160; 39 L. J. Ex. 62; 22 L. T. 103; 18 W. R. 459 . . . . .	132
Coatsworth v. Johnson, 55 L. J. Q. B. 220; 54 L. T. 520. . . . .	2, 47, 121, 123, 124
Cobb v. Stokes, 8 East, 358; 9 R. R. 464 . . . . .	46
Cocks v. Darson, Hob. 215 . . . . .	177
Cockson v. Cock, Cro. Jac. 125 . . . . .	65
Cogswell v. Armstrong, 2 K. & J. 227; 1 Jur. N. S. 1162 . . . . .	157
Cole v. Eagle, 8 B. & C. 409 . . . . .	18
Cole's Case, 1 Salk. 196 . . . . .	65
Coles v. Coles, L. R. 1 P. & M. 70; 35 L. J. P. 40; 13 L. T. 608; 14 W. R. 290 . . . . .	239
Collier v. Nokes, 2 C. & K. 1012 . . . . .	75, 235
Colling v. Treweek, 6 B. & C. 394 . . . . .	251
Collingwood v. Pace, 1 Vent. 413 . . . . .	166
Colville v. Hall, 14 Ir. C. L. R. 265 . . . . .	60
Compton v. Preston, 21 Ch. D. 138; 51 L. J. Ch. 680; 47 L. T. 122; 30 W. R. 563 . . . . .	261
Congleton v. Pattison, 10 East, 130 . . . . .	65, 66
Connor v. West, 5 Burr. 2672 . . . . .	266
Cook v. Enchmarch, 2 Ch. D. 111; 45 L. J. Ch. 504; 24 W. R. 293. 262 — v. Whellock, 24 Q. B. D. 658; 59 L. J. Q. B. 329; 62 L. T. 675; 38 W. R. 534; 54 J. P. 423 . . . . .	27
Cooke v. Cholmondeley, 4 Drew. 326; 27 L. J. Ch. 826; 7 Jur. N. S. 803 . . . . .	82
— v. Loxley, 5 T. R. 4; 2 R. R. 521 . . . . .	28, 30
— v. Tanswell, 8 Taunt. 450; 2 Moore, 513 . . . . .	247, 250
Coombe v. Green, 11 M. & W. 480; 2 Dowl. N. S. 1023; 12 L. J. Ex. 291 . . . . .	86
Coombs v. Cook, 1 C. & E. 75 . . . . .	91
Cooper v. Blandy, 1 B. N. C. 45 . . . . .	29, 30
— v. France, 14 Jur. 215; 19 L. J. Ch. 313 . . . . .	165
— v. Twibill, 3 Camp. 286, n.; 13 R. R. 803, n. . . . .	102
Cope v. Cope, 1 M. & Rob. 269; 5 C. & P. 604. . . . .	244, 245

	PAGE
Coppinger v. Gubbins, 3 J. & L. 397; 9 Ir. Eq. R. 304 . . . . .	93
Corbett v. Plowden, 25 Ch. D. 678; 54 L. J. Ch. 109; 50 L. T. 740; 32 W. R. 667 . . . . .	134
Corbishley, Re, 14 Ch. D. 846; 49 L. J. Ch. 266; 28 W. R. 536 . . . . .	242
Cornish v. Cleife, 3 H. & C. 446; 34 L. J. Ex. 19; 11 Jur. N. S. 181; 11 L. T. 606; 13 W. R. 389 . . . . .	85
— v. Searell, 8 B. & C. 471; 1 M. & Ry. 708 . . . . .	30
— v. Stubbs, L. R. 5 C. P. 334; 39 L. J. C. P. 202; 22 L. T. 21; 13 W. R. 547 . . . . .	37, 46, 61
Corpus Christi Coll. v. Rogers, 49 L. J. Ex. 4; 44 J. P. 216 . . . . .	201
Cotesworth v. Spokes, 10 C. B. N. S. 103; 80 L. J. C. P. 220; 7 Jur. N. S. 803; 4 L. T. 214; 9 W. R. 436 . . . . .	76, 110
Cotterell v. Dutton, 4 Taunt. 826; 14 R. R. 675 . . . . .	210
Cottingham v. King, 1 Burr. 623 . . . . .	266
Cotton's Case, Cro. Eliz. 189 . . . . .	10
Cottrell v. Hughes, 15 C. B. 532; 1 Jur. N. S. 448; 24 L. J. C. P. 107 . . . . .	3, 4
Coward v. Gregory, L. R. 2 C. P. 153; 12 Jur. N. S. 1000; 36 L. J. C. P. 1; 15 L. T. 279; 15 W. R. 170 . . . . .	84, 86, 113, 114
Cowper v. Cowper, 2 P. Wms. 720 . . . . .	166
Cox v. Brown, Chan. Rep. 170 . . . . .	81
— v. Wright, 9 Jur. N. S. 98; 2 N. R. 436 . . . . .	176
Cramer v. Mott, L. R. 5 Q. B. 357; 39 L. J. Q. B. 172; 22 L. T. 857; 18 W. R. 947 . . . . .	282
Crane v. Jullion, 2 Ch. D. 220; 24 W. R. 691 . . . . .	254
Crawley v. Price, L. R. 10 Q. B. 302; 33 L. T. 208; 23 W. R. 874 54, 55, 56 . . . . .	
Creak v. Brighton, 1 F. & F. 110 . . . . .	284
Crease v. Barrett, 1 C. M. & R. 919; 5 Tyr. 458 . . . . .	229
Creswell v. Davidson, 56 L. T. 811; W. N. 1887, p. 87 . . . . .	67, 121, 124
Creswick v. Woodhead, 4 M. & Gr. 811; 6 Jur. 973; 12 L. J. C. P. 111; 5 Scott, N. R. 778 . . . . .	163
Crocker v. Fothergill, 2 B. & Ald. 652 . . . . .	255
Croft v. Croft, 4 Swa. & Tr. 10 . . . . .	239
— v. London Bank, 14 Q. B. D. 347; 54 L. J. Q. B. 277; 52 L. T. 374 . . . . .	118
— v. Lumley, 6 H. L. C. 672; 5 E. & B. 648; 4 id. 608; 24 L. J. Q. B. 78; 27 id. 321 . . . . .	56, 58, 80, 107, 108, 109, 113, 118, 256, 257
— v. Pawlett, 2 Str. 1109 . . . . .	239
Cronin v. Rogers, 1 C. & E. 348 . . . . .	109, 124
Cronk v. Frith, 9 C. & P. 197 . . . . .	247
Cropp v. Hambleton, Cro. Eliz. 48; Co. Lit. 202 a.; Moore, 223 . . . . .	72
Crosby v. Percy, 1 Taunt. 364 . . . . .	247
Cross, Re, 20 Ch. D. 109; 51 L. J. Ch. 645; 45 L. T. 777; 30 W. R. 376 . . . . .	217
— v. Jordan, 8 Exch. 149; 22 L. J. Ex. 70; 17 Jur. 93 . . . . .	76
Crosse v. Raw, L. R. 9 Ex. 209; 43 L. J. Ex. 144; 23 W. R. 6 . . . . .	99

	PAGE
Crowle v. Russel, 4 C. P. D. 186 ; 48 L. J. C. P. 76 ; 39 L. T. 320 ; 27 W. R. 84 . . . . .	143
Crowley v. Vitty, 7 Exch. 319 ; 21 L. J. Ex. 135 . . . . .	269
Crowther v. Crowther, 23 Beav. 305 ; 25 L. J. Ch. 511 ; 2 Jur. N. S. 274 . . . . .	196
Crusoe v. Bugby, 3 Wils. 234 ; 2 W. Bl. 766 . . . . .	77, 79
Culley v. Doe, 11 A. & E. 1008 ; 3 P. & D. 539 . . . . .	178, 194, 208
Cunliffe v. Sefton, 2 East, 183 . . . . .	247
Cunningham v. Foot, 3 App. Cas. 974 ; 38 L. T. 889 ; 26 W. R. 858 . . . . .	215
Currie v. Child, 3 Camp. 283 . . . . .	247
Curzon v. Lomax, 5 Esp. 60 . . . . .	228
Cuthbertson v. Irving, 4 H. & N. 742 ; 6 <i>id.</i> 135 ; 28 L. J. Ex. 306 ; 29 <i>id.</i> 485 ; 3 L. T. 335 ; 8 W. R. 704 ; 5 Jur. N. S. 740 ; 6 <i>id.</i> 1211 . . . . .	27, 29, 31, 62
Cutting v. Derby, 2 W. Bl. 1075 . . . . .	41
 DAINTRY v. Brocklehurst, 3 Exch. 207 ; 18 L. J. Ex. 57 . . . . .	26, 227
Dakin v. Cope, 2 Russ. 170 . . . . .	108
Dalhousie v. McDonall, 7 Cl. & Fin. 817 . . . . .	168
Dancer v. Hastings, 12 Moore, 34 ; 4 Bing. 2 . . . . .	28
Daniels v. Davison, 16 Ves. 249 ; 10 R. R. 171 . . . . .	48
Darcy v. Askwith, Hob. 234 . . . . .	93
Darlington v. Hamilton, Kay, 550 . . . . .	67
— v. Pritchard, 4 M. & Gr. 783 ; 2 Dowl. N. S. 664 ; 12 L. J. C. P. 34 ; 7 Jur. 677 ; 5 Scott, N. R. 610 . . . . .	33
Dartmouth v. Spittle, 24 L. T. 67 ; 19 W. R. 444 . . . . .	194, 196
Daubuz v. Lavington, 13 Q. B. D. 347 ; 53 L. J. Q. B. 283 ; 51 L. T. 206 ; 32 W. R. 772 . . . . .	131, 254
Davenport v. Reg., 3 App. Cas. 115 ; 47 L. J. P. C. 8 ; 37 L. T. 727 60, 108, 109, 112	
Davey v. Railway Assurance Co., 44 L. J. Ch. 568 ; 43 L. T. 234 . . . . .	6
Davies v. Davies, 38 Ch. D. 499 ; 57 L. J. Ch. 1093 ; 58 L. T. 314 ; 36 W. R. 399 . . . . .	94
— v. Lowndes, 6 M. & Gr. 471 ; 7 Scott, N. R. 141 ; 12 L. J. Ex. 506 . . . . .	245, 246
— v. Pierce, 2 T. R. 53 ; 1 R. R. 419 . . . . .	229
— v. Underwood, 2 H. & N. 570 ; 3 Jur. N. S. 1223 ; 27 L. J. Ex. 113 . . . . .	69
Davis v. Burrell, 10 C. B. 821 ; 15 Jur. 658 . . . . .	9, 95, 96
— v. Eyton, 7 Bing. 154 ; 4 Moo. & P. 820 . . . . .	55, 68
— v. James, 26 Ch. D. 778 ; 53 L. J. Ch. 523 ; 50 L. T. 115 ; 32 W. R. 406 . . . . .	262
— v. Kirk, 2 K. & J. 391 . . . . .	166
— v. Vass, 15 East, 97 . . . . .	251
Davison v. Gent, 1 H. & N. 744 ; 26 L. J. Ex. 122 ; 3 Jur. N. S. 342 . . . . .	51

	PAGE
Davison v. Wilson, 11 Q. B. 890 ; 17 L. J. Q. B. 196 ; 12 Jur. 617	11, 19
Davy, <i>Ex parte</i> , 2 Dowl. N. S. 24 . . . . .	20
Dawes v. Bagnall, 23 W. R. 690 . . . . .	217
Dawkins v. Penrhyn, 4 App. Cas. 51 ; 6 Ch. D. 318 ; 48 L. J. Ch. 304 ; 37 L. T. 80 ; 39 <i>id.</i> 583 ; 26 W. R. 6 ; 27 <i>id.</i> 173 . . . . .	215, 263
Day v. Day, L. R. 3 P. C. 751 ; 40 L. J. P. C. 35 ; 24 L. T. 856 ; 19 W. R. 1017 . . . . .	203, 204
— v. Williams, 2 C. & J. 460 . . . . .	8
Dean v. Thwaite, 21 Beav. 621 . . . . .	217
De Beauvoir v. Owen, 5 Exch. 166 ; 19 L. J. Ex. 177 . . . . .	225
De Bode's Case, 8 Q. B. 208 ; 10 Jur. 217 . . . . .	26
Delaney v. Fox, 2 C. B. N. S. 768 ; 1 <i>id.</i> 166 ; 26 L. J. C. P. 5, 248 ; 2 Jur. N. S. 1233 . . . . .	27, 32, 234, 282, 283
Den v. Hopkinson, 3 D. & R. 507 . . . . .	40
Dendy v. Nicholl, 4 C. B. N. S. 376 ; 27 L. J. C. P. 220 . . . . .	110
Denn v. Purvis, 1 Burr. 326 . . . . .	177
— v. Spray, 1 T. R. 466 ; 1 R. R. 250 . . . . .	188, 237
— v. Walker, 2 Peake, 194 . . . . .	39
— v. White, 7 T. R. 112 . . . . .	191
Denne v. Judge, 11 East, 288 . . . . .	177
Dennis v. Crompton, W. N. 1882, 121 . . . . .	262
— v. Loving, Hardr. 424 . . . . .	79
Deptford Churchwardens v. Sketchley, 8 Q. B. 394 . . . . .	18
De Roos Peerage, 2 Coop. 541 . . . . .	246
Des Barres v. Shey, 29 L. T. 592 ; 22 W. R. 273 . . . . .	194
Devereux v. Underhill, 2 Keb. 245 . . . . .	266
Devonshire v. Barrow Hematite Co., 2 Q. B. D. 286 ; 46 L. J. Q. B. 96, 435 ; 36 L. T. 355 ; 25 W. R. 469 . . . . .	93
Dibble v. Bowater, 2 E. & B. 564 ; 22 L. J. Q. B. 396 ; 17 Jur. 1054 . . . . .	72
Digby v. Atkinson, 4 Camp. 275 . . . . .	84
Dinsdale v. Iles, 2 Lev. 88 ; Raym. 224 ; 1 Ventr. 247 . . . . .	48
Dixon v. Baty, L. R. 1 Ex. 259 ; 12 Jur. N. S. 1024 ; 14 W. R. 836 . . . . .	34
— v. Gayfere, 17 Beav. 421 ; 23 L. J. Ch. 60 . . . . .	227
— v. Wigram, 2 Cr. & J. 613 . . . . .	141
Dodwell v. Gibbs, 2 C. & P. 615 . . . . .	191
Doe v. Abel, 2 M. & S. 541 ; 15 R. R. 342 . . . . .	59
— v. Abrahams, 1 Stark. 305 . . . . .	28
— v. Adams, 2 C. & J. 232 ; 2 Tyrr. 289 . . . . .	60
— v. Alexander, 2 M. & S. 525 ; 15 R. R. 338 . . . . .	77
— v. Allen, 3 Taunt. 78 ; 12 R. R. 597 . . . . .	112
— v. Alston, 1 T. R. 491 . . . . .	267
— v. Amey, 12 A. & E. 476 ; 4 P. & D. 177 . . . . .	49
— v. Andrews, 4 Bing. 348 ; 12 Moore, 601 . . . . .	32
— v. ——— 15 Q. B. 756 . . . . .	242, 243
— v. Angell, 9 Q. B. 328 ; 15 L. J. Q. B. 193 ; 10 Jur. 705 . . . . .	197, 204, 206
— v. Archer, 14 East, 245 ; 12 R. R. 509 . . . . .	44

	PAGE
Doe v. Arkwright, 5 C. & P. 575; 2 A. & E. 182; 1 N. & M. 731..	228, 229
— v. Asby, 10 A. & E. 71; 2 P. & D. 302 . . . . .	116
— v. Ashley, 10 Q. B. 663; 16 L. J. Q. B. 356; 11 Jur. 905. . . . .	230
— v. Austin, 9 Bing. 41; 2 Moo. & Sc. 107 . . . . .	26, 27, 28, 29, 30
— v. Baker, 8 Taunt. 241; 2 Moore, 189 . . . . .	85
— v. Bancks, 4 B. & Ald. 401; Gow, 220 . . . . .	59, 105, 108
— v. Barber, 2 T. R. 749; 1 R. R. 611 . . . . .	129
— v. Barnard, 18 Q. B. 945; 18 L. J. Q. B. 306; 13 Jur. 915. . . . .	225, 227
— v. Barnes, 8 Q. B. 1037; 15 L. J. Q. B. 293; 10 Jur. 520. . . . .	238, 242
— v. Barton, 11 A. & E. 307; 3 P. & D. 194; 4 Jur. 432 . . . . .	32
— v. Bateman, 2 B. & Ald. 168 . . . . .	60, 79
— v. Bather, 12 Q. B. 941; 18 L. J. Q. B. 2; 12 Jur. 1037 . . . . .	45, 267
— v. Batten, 1 Cowp. 243; 9 East, 314, n.; 9 R. R. 470, n. . . . .	113
— v. Baytup, 3 A. & E. 188; 4 N. & M. 837; 1 H. & W. 270 . . . . .	27
— v. Beckett, 4 Q. B. 601; 12 L. J. Q. B. 236; 7 Jur. 532 . . . . .	28, 205, 228
— v. Bell, 5 T. R. 471; 2 R. R. 642; 2 Sm. L. C. 110 (ed. 9) . . . . .	36, 49
— v. Bellamy, 2 M. & S. 87; 14 R. R. 595 . . . . .	137
— v. Benham, 7 Q. B. 976; 14 L. J. Q. B. 342; 9 Jur. 662 . . . . .	226
— v. Benson, 4 B. & Ald. 588 . . . . .	40
— v. Bevan, 3 M. & S. 353 . . . . .	80, 81
— v. Biggs, 1 Taunt. 367; 2 <i>id.</i> 109; 11 R. R. 358 . . . . .	39
— v. Birch, 1 M. & W. 402; Tyr. & Gr. 769 . . . . .	56, 60, 108, 110, 112
— v. Birchmore, 9 A. & E. 662; 1 P. & D. 448 . . . . .	27, 257
— v. Bird, 6 C. & P. 195; 7 <i>id.</i> 6; 4 N. & M. 285; 2 A. & E. 161 . . . . .	86, 88, 89, 104, 106
— v. ——— 11 East, 49 . . . . .	178
— v. Blackburn, 1 M. & Rob. 547 . . . . .	166
— v. Blakeway, 5 C. & P. 563 . . . . .	203
— v. Bliss, 4 Taunt. 735 . . . . .	114
— v. Bond, 5 B. & C. 855; 8 D. & R. 733 . . . . .	9
— v. Booth, 2 B. & P. 219; 5 R. R. 575 . . . . .	137
— v. Boulter, 6 A. & E. 675; 1 N. & P. 650 . . . . .	174
— v. Boulton, 6 M. & S. 148 . . . . .	49
— v. Bousfield, 6 Q. B. 492; 1 C. & K. 558; 14 L. J. Q. B. 42; . . . . .	129, 184, 188
— v. Bowditch, 8 Q. B. 973; 15 L. J. Q. B. 266; 10 Jur. 637..	57, 58, 71, 73, 76, 175
— v. Bradbury, 2 D. & R. 706 . . . . .	162
— v. Bramston, 3 A. & E. 63; 1 H. & W. 162; 4 N. & M. 664..	199, 211
— v. Brandling, 7 B. & C. 643; 1 M. & Ry. 600 . . . . .	59
— v. Bray, 8 B. & C. 813; 3 M. & Ry. 428; M. & M. 166 . . . . .	243, 246
— v. Breach, 6 Esp. 106 . . . . .	56
— v. Brightwen, 10 East, 583; 10 R. R. 395 . . . . .	237
— v. Brindley, 12 Moore, 37 . . . . .	112
— v. Brown, 7 A. & E. 447; 2 N. & P. 592 . . . . .	29, 30
— v. Browne, 8 East, 165; 9 R. R. 397 . . . . .	40
— v. Brydges, 2 D. & R. 29 . . . . .	75

## TABLE AND INDEX OF CASES.

xxiii

	PAGE
Doe v. Bucknell, 8 C. & P. 566 . . . . .	184
— v. Budden, 5 B. & Ald. 626 ; 1 D. & R. 243 . . . . .	28, 29
— v. Burdett, 4 A. & E. 1 ; 6 M. & Gr. 386 . . . . .	239, 248
— v. Burlington, 5 B. & Ad. 507 ; 2 N. & M. 534 . . . . .	93
— v. Burt, 1 T. R. 701 ; 1 R. R. 367 . . . . .	83, 229, 230
— v. Burton, 16 Q. B. 807 ; 15 Jur. 990 . . . . .	27, 30
— v. — 9 C. & P. 254 . . . . .	29
— v. Butcher, 1 Doug. 50 . . . . .	59, 107
— v. — 6 Q. B. 115 . . . . .	59
— v. Butler, 2 Esp. 589 ; 5 R. R. 756 . . . . .	39
— v. Byron, 1 C. B. 628 ; 3 D. & L. 81 . . . . .	76, 118
— v. Cadwallader, 2 B. & Ad. 478 . . . . .	133, 135
— v. Calvert, 2 Camp. 387 ; 11 R. R. 745 . . . . .	89, 45, 238, 239
— v. Cappe, 3 B. N. C. 768 . . . . .	141
— v. Carew, 2 Q. B. 317 ; 6 Jur. 457 ; 1 G. & D. 640 . . . . .	57
— v. Carpenter, 16 Q. B. 181 ; 20 L. J. Q. B. 70 . . . . .	230
— v. Carter, Ry. & M. 237 . . . . .	179, 238
— v. — 8 T. R. 57, 801 ; 4 R. R. 536 . . . . .	80, 81
— v. — 9 Q. B. 893 ; 18 L. J. Q. B. 305 . . . . .	204
— v. Cartwright, 1 C. & P. 218 ; Ry. & M. 62 . . . . .	229
— v. Cawdor, 1 C. M. & R. 398 ; 4 Tyr. 352 . . . . .	48, 52, 53
— v. Challis, 17 Q. B. 166 ; 18 <i>id.</i> 224 ; 20 L. J. Q. B. 113 ; 21 <i>id.</i> 227 ; 15 Jur. 601 ; 16 Jur. 969 . . . . .	191, 192
— v. Chambers, 4 A. & E. 410 ; 1 H. & W. 749 ; 6 N. & M. 539 . . . . .	249
— v. Chaplin, 3 Taunt. 120 ; 12 R. R. 615 . . . . .	41, 177
— v. Church, 3 Camp. 71 . . . . .	44
— v. Clarke, 8 East, 185 ; 9 R. R. 402 . . . . .	50, 55, 101, 102
— v. — 14 East, 488 . . . . .	180
— v. Clifford, 2 C. & K. 448 . . . . .	228, 251
— v. Clift, 12 A. & E. 566 ; 4 P. & D. 579 . . . . .	186, 187
— v. Clifton, 4 A. & E. 809 ; 2 H. & W. 285 . . . . .	136, 141
— v. Cock, 4 B. & C. 259 . . . . .	234
— v. Cockell, 4 A. & E. 478 ; 6 N. & M. 179 . . . . .	41, 180
— v. Cole, 6 C. & P. 359 . . . . .	250
— v. Cooke, 6 Bing. 174 ; 3 M. & P. 411 . . . . .	3
— v. —, 7 Bing. 346 ; 5 M. & P. 181 . . . . .	227
— v. —, 5 Esp. 221 . . . . .	
— v. Coombes, 9 C. B. 714 ; 19 L. J. C. P. 306 . . . . .	207
— v. Cooper, 8 T. R. 645 . . . . .	257
— v. —, 1 M. & Gr. 135 ; 1 Scott, N. R. 36 . . . . .	51, 52
— v. Coulthred, 7 A. & E. 235 ; 2 N. & P. 165 . . . . .	229
— v. Cox, 11 Q. B. 122 ; 17 L. J. Q. B. 3 ; 11 Jur. 991 . . . . .	131, 132
— v. Creed, 5 Bing. 327 ; 2 M. & P. 648 . . . . .	257
— v. Crick, 5 Esp. 196 ; 8 R. R. 848 . . . . .	42, 44
— v. Curwood, 1 H. & W. 140 . . . . .	111
— v. David, 5 Tyr. 125 ; 1 C. M. & R. 405 . . . . .	55, 66, 100
— v. Davies, 16 L. J. Q. B. 218 . . . . .	245
— v. —, 9 Q. B. 648 ; 16 L. J. Q. B. 97 ; 11 Jur. 182 . . . . .	239

	PAGE
Doe v. Davies, 7 Exch. 89 ; 21 L. J. Ex. 60 . . . . .	48, 131, 132
— v. Dawson, 3 Wils. 49 . . . . .	266
— v. Day, 2 Q. B. 147 ; 12 L. J. Q. B. 86 ; 6 Jur. 913 . . . . .	128, 131
— v. Dixon, 5 A. & E. 834 ; 1 N. & P. 255 ; 2 H. & W. 364 . . . . .	165
— v. Dobell, 1 Q. B. 806 ; 1 G. & D. 218 . . . . .	36, 38
— v. Donovan, 2 Camp. 78 ; 1 Taunt. 555 . . . . .	83
— v. Durnford, 2 C. & J. 667 . . . . .	87, 113, 232
— v. —, 2 M. & S. 62 . . . . .	230
— v. Dyeball, M. & M. 346 ; 3 C. & P. 610 . . . . .	227
— v. Dyson, M. & M. 77 . . . . .	233
— v. Edgar, 2 B. N. C. 498 ; 2 Scott, 732 ; 1 Hodges, 437 . . . . .	29
— v. Edmonds, 6 M. & W. 295 . . . . .	210
— v. Edwards, 5 B. & Ad. 1065 ; 6 C. & P. 208 ; 3 N. & M. 193 . . . . .	31, 32, 60, 133
— v. Elsam, M. & M. 189 . . . . .	56, 91
— v. Evans, 1 Cr. & M. 450 ; 3 Tyr. 339 . . . . .	143
— v. —, 9 M. & W. 48 . . . . .	52
— v. Eykins, 1 C. & P. 154 ; Ry. & M. 29 . . . . .	111, 112
— v. Eyre, 17 Q. B. 366 ; 20 L. J. Q. B. 431 ; 15 Jur. 1031 . . . . .	209
— v. Fenn, 3 Camp. 190 . . . . .	177
— v. Filliter, 13 M. & W. 47 ; 18 L. J. Ex. 275 ; 2 D. & L. 186 . . . . .	192
— v. Fletcher, 8 B. & C. 25 ; 2 M. & Ry. 206 . . . . .	179
— v. Flynn, 1 C. M. & R. 137 ; 4 Tyr. 619 . . . . .	52
— v. Forwood, 3 Q. B. 627 . . . . .	40, 41
— v. Forster, 13 East, 405 ; 12 R. R. 383 . . . . .	39
— v. Foster, 3 C. B. 215 ; 15 L. J. C. P. 263 . . . . .	27, 41, 45, 181
— v. Francis, 2 M. & Rob. 57 ; 4 M. & W. 331 . . . . .	30
— v. Franks, 2 C. & K. 678 . . . . .	233
— v. Frowd, 4 Bing. 557 ; 1 M. & P. 480 . . . . .	52
— v. Fuchau, 15 East, 236 ; 13 R. R. 472 . . . . .	77, 233
— v. Fuller, 1 Tyr. & Gr. 17 . . . . .	23, 30
— v. Galloway, 5 B. & Ad. 43 ; 2 N. & M. 240 . . . . .	230
— v. Gardiner, 12 C. B. 319 ; 21 L. J. C. P. 222 . . . . .	41
— v. Giles, 5 Bing. 421 ; 2 M. & P. 749 . . . . .	49, 130, 133, 135, 221
— v. Gladwin, 6 Q. B. 953 ; 14 L. J. Q. B. 189 ; 9 Jur. 508 . . . . .	57, 95, 113, 114
— v. Glenn, 1 A. & E. 49 ; 3 N. & M. 837 . . . . .	123
— v. Godwin, 4 M. & S. 265 . . . . .	56, 57, 137
— v. Golding, 6 Moore, 231 . . . . .	57
— v. Goldsmith, 2 Cr. & J. 674 ; 2 Tyr. 710 . . . . .	28, 61
— v. Goldwin, 2 Q. B. 143 ; 1 G. & D. 463 . . . . .	40, 41, 44, 131, 236
— v. Goodier, 10 Q. B. 957 ; 16 L. J. Q. B. 435 . . . . .	132, 133, 135
— v. Gopsall, 4 Q. B. 603, n. ; 5 Jur. 170 . . . . .	207
— v. Gore, 2 M. & W. 320 . . . . .	252
— v. Gower, 17 Q. B. 589 ; 21 L. J. Q. B. 57 ; 16 Jur. 100 . . . . .	52, 180, 205
— v. Grafton, 18 Q. B. 496 ; 21 L. J. Q. B. 276 . . . . .	36, 33
— v. Green, 4 Esp. 198 . . . . .	39
— v. —, 9 A. & E. 658 ; 1 P. & D. 454 . . . . .	36



## TABLE AND INDEX OF CASES.

XXV

	PAGE
Doe v. Greenhill, 4 B. & Ald. 684 . . . . .	145
— v. Griffin, 15 East, 298; 13 R. R. 474. . . . .	241, 242
— v. Grubb, 10 B. & C. 816 . . . . .	52, 53
— v. Guy, 3 East, 120; 4 Esp. 154; 6 R. R. 563 . . . . .	162, 235
— v. Hales, 7 Bing. 322; 5 M. & P. 132. . . . .	133, 135
— v. Hall, 5 M. & Gr. 795; 1 D. & L. 49 . . . . .	231
— v. Hare, 2 Cr. & M. 145; 4 Tyr. 29; 2 Dowl. 245 . . . . .	192
— v. Hares, 4 B. & Ad. 435; 1 N. & M. 237 . . . . .	137
— v. Harland, 10 A. & E. 761; 3 Jur. 1189 . . . . .	267
— v. Harlow, 12 A. & E. 40 . . . . .	192
— v. Harris, 16 M. & W. 517; 16 L. J. Ex. 190 . . . . .	30
— v. Harrison, 6 Q. B. 631; 14 L. J. Q. B. 771; 9 Jur. 104 . . . . .	187
— v. Harvey, 8 Bing. 239; 1 M. & Sc. 374 . . . . .	191
— v. —, R. & Moo. 297 . . . . .	246
— v. Hatherley, 2 Str. 1152; 7 Mod. 420 . . . . .	267
— v. Hazell, 1 Esp. 94; 5 R. R. 722 . . . . .	37
— v. Hawke, 2 East, 481 . . . . .	81, 102
— v. Heakin, 6 A. & E. 495; 2 N. & P. 680 . . . . .	228
— v. Hellier, 3 T. R. 162; 1 R. R. 680 . . . . .	184, 185, 186
— v. Hilder, 2 B. & Ald. 782 . . . . .	3, 46, 146, 147, 143
— v. Hiley, 10 B. & C. 885; 5 M. & Ry. 706 . . . . .	180
— v. Hinde, 2 M. & Rob. 441 . . . . .	206, 225
— v. Hodgson, 12 A. & E. 135; 2 M. & Rob. 283; 4 Jur. 1202; 4 P. & D. 142 . . . . .	190
— v. Hogg, 4 D. & R. 226; 1 C. & P. 160 . . . . .	30
— v. Horn, 3 M. & W. 333; 5 id. 564 . . . . .	3, 178
— v. Horne, 3 Q. B. 757; 12 L. J. Q. B. 72; 7 Jur. 38; 3 G. & D. 239 . . . . .	137
— v. Horrocks, 1 C. & K. 566 . . . . .	208
— v. Horsley, 1 A. & E. 766; 3 N. & M. 567 . . . . .	49, 59, 71, 72, 76, 174
— v. Howard, 11 East, 498; 11 R. R. 255 . . . . .	39
— v. Hubbard, 15 Q. B. 227; 20 L. J. Q. B. 61; 14 Jur. 1110 . . . . .	230
— v. Huddart, 2 C. M. & R. 316; 4 Dowl. 437; 5 Tyr. 846; 1 Gale, 260 . . . . .	191
— v. Hughes, 7 M. & W. 139 . . . . .	39, 41
— v. —, 11 Jur. 698 . . . . .	133, 135
— v. Hull, 2 D. & R. 38 . . . . .	202
— v. Humphreys, 2 East, 237 . . . . .	45
— v. Ingleby, 14 M. & W. 91; 15 id. 465; 14 L. J. Ex. 246...55, 56, 101 . . . . .	45
— v. Inglis, 3 Taunt. 54 . . . . .	45
— v. Jackson, 2 Stark. 293 . . . . .	86
— v. —, 1 Doug. 175 . . . . .	44
— v. —, 1 B. & C. 448; 2 D. & R. 514 . . . . .	47
— v. Jepson, 3 B. & Ad. 402 . . . . .	57
— v. Jesson, 6 East, 80; 2 Smith, 236; 8 R. R. 408 . . . . .	210
— v. Johnson, 1 Stark. 411 . . . . .	76, 110
— v. —, Gow, 173 . . . . .	227
— v. —, 6 Esp. 10; 9 R. R. 800 . . . . .	38

	PAGE
<i>Doe v. Jones</i> , 9 M. & W. 372; 1 Dowl. N. S. 352; 12 L. J. Ex. 265; 6 Jur. 302	129, 147
— <i>v. Jones</i> , 4 B. & Ad. 126; 1 N. & M. 6	87, 98
— <i>v. Jones</i> , 4 T. R. 300; 2 R. R. 390	210
— <i>v. —</i> , 15 M. & W. 580; 16 L. J. Ex. 58	33
— <i>v. —</i> , 13 Q. B. 774; 18 L. J. Q. B. 260; 18 Jur. 824	4
— <i>v. —</i> , 2 C. & K. 748	84
— <i>v. —</i> , 5 Exch. 498; 19 L. J. Ex. 405	113
— <i>v. Jordan</i> , 4 C. & P. 146	229
— <i>v. Keeling</i> , 1 M. & S. 95; 14 R. R. 405	89
— <i>v. Kensington</i> , 8 Q. B. 429; 15 L. J. Q. B. 153; 10 Jur. 305	137, 173
— <i>v. Kightley</i> , 7 T. R. 63; 4 R. R. 375	45
— <i>v. King</i> , 6 Exch. 791; 2 L. M. & P. 493	177, 266
— <i>v. Knight</i> , 5 B. & C. 671; 8 D. & R. 348	250
— <i>v. Laming</i> , 4 Camp. 73; 15 R. R. 728	94
— <i>v. Langdon</i> , 12 Q. B. 711; 18 L. J. Q. B. 17; 13 Jur. 96	8
— <i>v. Langfield</i> , 16 M. & W. 497	229
— <i>v. Laurence</i> , 4 Taunt. 23	61
— <i>v. Law</i> , 2 W. Bl. 1180	267
— <i>v. Lawder</i> , 1 Stark. 308	47
— <i>v. Lawes</i> , 7 A. & E. 195; 2 N. & P. 195	187
— <i>v. Lawley</i> , 13 Q. B. 954; 3 N. & M. 331	209
— <i>v. Lea</i> , 11 East, 312	37, 40
— <i>v. Lediard</i> , 4 B. & Ad. 187; 1 N. & M. 688	137
— <i>v. Lewis</i> , 1 Burr. 614; 2 Ken. 320	128
— <i>v. —</i> , 5 A. & E. 277; 2 H. & W. 162; 6 N. & M. 764	62, 110
— <i>v. —</i> , 13 M. & W. 241; 13 L. J. Ex. 200; 14 <i>id.</i> 198; 2 D. & L. 667	137
✓ — <i>v. Lightfoot</i> , 8 M. & W. 553; 5 Jur. 966	131, 183, 221
— <i>v. Lines</i> , 11 Q. B. 402; 17 L. J. Q. B. 108; 12 Jur. 80	38
— <i>v. Litherland</i> , 4 A. & E. 784; 6 N. & M. 313	29
— <i>v. Liversedge</i> , 11 M. & W. 517; 13 L. J. Ex. 61	211, 212
— <i>v. Long</i> , 9 C. & P. 773	51, 52, 53, 199
— <i>v. Louch</i> , 6 D. & L. 270; 18 L. J. Q. B. 278; 14 Jur. 853	140, 142
— <i>v. Lucas</i> , 5 Esp. 153; 8 R. R. 842	42
— <i>v. Ludlam</i> , 7 Bing. 275; 5 M. & P. 43	187
— <i>v. Mabblerley</i> , 6 C. & P. 126	235
— <i>v. M'Kaeg</i> , 10 B. & C. 721; 5 M. & Ry. 620	47
— <i>v. Maisey</i> , 8 B. & C. 767; 3 M. & Ry. 107	49, 130
— <i>v. Marchetti</i> , 1 B. & Ad. 715	56
— <i>v. Martin</i> , Car. & Marsh. 32	227
— <i>v. Mason</i> , 1 Esp. 53; 5 R. R. 718	249
— <i>v. Massey</i> , 17 Q. B. 373; 15 Jur. 1031; 20 L. J. Q. B. 434	195, 221
— <i>v. Masters</i> , 2 B. & C. 490; 4 D. & R. 45	73
— <i>v. Matthews</i> , 11 C. B. 675	38
— <i>v. Mayo</i> , 7 L. J. K. B. 84	139
— <i>v. Meux</i> , 4 B. & C. 606; 1 C. & P. 346; 7 D. & R. 98	87, 110

## TABLE AND INDEX OF CASES.

xxvii

	PAGE
Doe v. Michael, 17 Q. B. 276 ; 20 L. J. Q. B. 480 ; 15 Jur. 677	. 228,
	239
— v. Miles, 1 Stark. 181 ; 4 Camp. 373 . . . . .	46
— v. Mills, 2 A. & E. 17 ; 1 M. & Rob. 885 . . . . .	29
— v. Milward, 3 M. & W. 328 . . . . .	37
— v. Mitchell, 1 B. & B. 11 ; 3 Moore, 229 . . . . .	30
— v. ——— 1 Jur. 795 . . . . .	42
— v. Mizem, 2 M. & Rob. 56 . . . . .	27, 29, 40
— v. Moffatt, 15 Q. B. 257 ; 19 L. J. Q. B. 438 ; 14 Jur. 935 . . . . .	50
— v. Moore, 9 Q. B. 555 ; 15 L. J. Q. B. 324 ; 10 Jur. 815 . . . . .	203, 204
— v. Morphett, 7 Q. B. 577 ; 14 L. J. Q. B. 345 ; 9 Jur. 776 . . . . .	38
— v. Morris, 11 L. J. Ex. 813 ; 6 Jur. 326 . . . . .	88
— v. Mouldsdales, 16 M. & W. 689 ; 16 L. J. Ex. 169 . . . . .	201, 211, 212
— v. Mulliner, 1 Esp. 460 ; 5 R. R. 744 . . . . .	196
— v. Murless, 6 M. & S. 110 . . . . .	26, 147, 148, 232
— v. Muscott, 12 M. & W. 832 ; 14 L. J. Ex. 185 . . . . .	184
— v. Nepean, 5 B. & Ad. 36 ; 2 M. & W. 894 . . . . .	242
— v. Oliver, 5 M. & Ry. 202 ; 10 R. & C. 181 ; 2 Sm. L. C. 803 (9 ed.) . . . . .	33, 129
— v. Olley, 12 A. & E. 481 ; 4 P. & D. 275 ; 4 Jur. 1084 . . . . .	132
— v. Ongley, 10 C. B. 25 ; 20 L. J. C. P. 26 . . . . .	28, 134
— v. Osborn, 5 B. & S. 67 . . . . .	104
— v. Owen, 2 C. & J. 71 ; 2 Tyr. 149 . . . . .	147
— v. Oxenden, 3 Taunt. 147 ; 12 R. R. 619 . . . . .	280
— v. Oxenham, 7 M. & W. 181 ; 4 Jur. 1016 . . . . .	198, 207
— v. Page, 5 Q. B. 767 ; 13 L. J. Q. B. 153 ; 8 Jur. 399 . . . . .	204
— v. Palmer, 16 East, 53 ; 14 R. R. 284 . . . . .	45
— v. Parker, Gow, 180 . . . . .	52
— v. Parry, 13 M. & W. 356 ; 2 D. & L. 430 . . . . .	145, 147
— v. Pasquali, 1 Peake, 259 ; 3 R. R. 688 . . . . .	52
— v. Passingham, 6 B. & C. 305 ; 9 D. & R. 416 . . . . .	1
— v. Paul, 3 C. & P. 618 . . . . .	74, 75
— v. Payne, 1 Stark. 86 . . . . .	232
— v. Pearson, 6 East, 173 ; 3 Smith, 295 ; 8 R. R. 447 . . . . .	177
— v. Peck, 1 B. & Ad. 428 . . . . .	64, 66, 93, 95, 109, 113, 114
— v. Pembroke, 11 East, 504 ; 11 R. R. 260 . . . . .	246
— v. Penfold, 8 C. & P. 536 . . . . .	227
— v. ——— 3 Q. B. 757 ; 6 Jur. 948 ; 12 L. J. Q. B. 70 ; 3 G. & D. 235 . . . . .	137, 241
— v. Perrin, 9 C. & P. 467 . . . . .	39
— v. Phillips, 2 Bing. 13 ; 9 Moore, 46 . . . . .	54
— v. ——— 3 B. & Ad. 753 ; 1 Dowl. 56 . . . . .	177
— v. ——— 10 Q. B. 130 ; 16 L. J. Q. B. 269 ; 11 Jur. 692 . . . . .	47
— v. Pittman, 2 N. & M. 673 . . . . .	52
— v. Plowman, 2 B. & Ad. 573 . . . . .	3
— v. Poole, 11 Q. B. 713 ; 17 L. J. Q. B. 143 ; 12 Jur. 450 . . . . .	51
— v. Porter, 3 T. R. 13 ; 1 R. R. 626 . . . . .	162
— v. Powell, 5 B. & C. 308 ; 8 D. & R. 35 . . . . .	56, 80

	PAGE
Doe v. Powell, 7 M. & Gr. 980 ; 14 L. J. C. P. 5 ; 8 Scott, N. R.	
687 ; 8 Jur. 1123 . . . . .	128
— r. — 1 A. & E. 531 ; 8 N. & M. 616 . . . . .	136
— v. Price, 9 Bing. 356 ; 2 Moo. & Sc. 464 . . . . .	47, 48, 52
— r. — 16 M. & W. 603 ; 16 L. J. Ex. 159 ; 11 Jur. 131 . . . . .	4
— v. Pritchard, 5 B. & Ad. 765 ; 2 N. & M. 489 . . . . .	55, 65, 66, 108, 114
— v. Prosser, 1 Cowp. 217 . . . . .	178
— v. Fulman, 3 Q. B. 622 . . . . .	228
— v. Quigley, 2 Camp. 505 ; 11 R. R. 780 . . . . .	49
— v. Raffan, 6 Esp. 4 . . . . .	35, 37
— r. Read, 12 East, 57 . . . . .	40, 177
— v. Reed, 5 B. & Ald. 232 . . . . .	8
— v. Rees, 4 B. N. C. 384 ; 6 Scott, 161 ; 1 Arn. 159 . . . . .	55, 108, 114
— r. — 6 C. & P. 610 . . . . .	34, 195
— v. Rickarby, 5 Esp. 4 . . . . .	26, 232
— r. Ridout, 5 Taunt. 519 . . . . .	35
— v. Ries, 7 Bing. 724 ; 8 <i>id.</i> 178 ; 1 Moo. & Sc. 259 . . . . .	128
— v. Roberts, 16 M. & W. 778 . . . . .	49, 176
— r. — 13 M. & W. 520 ; 14 L. J. Ex. 274 . . . . .	7
— v. Robinson, 3 B. N. C. 677 ; 4 Scott, 396 . . . . .	40
— v. Robson, 2 C. & P. 245 . . . . .	69, 231
— v. Rock, 4 M. & Gr. 30 ; 6 Jur. 266 ; Car. & M. 549 . . . . .	205, 216
— r. Roe, 2 B. & Ad. 922 ; 1 Dowl. 143 . . . . .	253, 267
— v. — 5 B. & Ad. 878 ; 2 N. & M. 468 . . . . .	267
— r. — 2 Chit. 179 . . . . .	189, 234
— r. — 4 C. B. 576 . . . . .	76
— v. — 7 C. B. 125 . . . . .	234
— v. — 7 C. B. 134 . . . . .	72
— v. — 6 C. B. 272 . . . . .	192
— r. — 4 Burr. 1996 . . . . .	255
— r. — 2 Dowl. 399, 428 . . . . .	234
— v. — 3 Dowl. 691 . . . . .	234
— v. — 4 Dowl. 222 . . . . .	181
— v. — 6 Dowl. 393 ; 3 M. & W. 279 . . . . .	234
— r. — 7 Dowl. 326 . . . . .	234
— v. — 8 Dowl. 444 . . . . .	267
— v. — 9 Dowl. 548 . . . . .	76
— v. — 9 Dowl. 971 . . . . .	266
— r. — 2 Dowl. N. S. 407 ; 7 Jur. 352 . . . . .	266
— r. — 1 D. & L. 657 . . . . .	234
— r. — 5 D. & L. 272 . . . . .	233
— v. — 1 D. & R. 540 . . . . .	253
— r. — 4 East, 585 . . . . .	267
— v. — 4 Esp. 185 ; 6 R. R. 850 . . . . .	45
— v. — 2 H. & W. 130 . . . . .	255
— r. — 12 L. J. Q. B. 97 . . . . .	234
— v. — 8 M. & W. 579 . . . . .	8
— v. — 11 Price, 507 . . . . .	255

## TABLE AND INDEX OF CASES.

xxix

	PAGE
Doe v. Roe 1 Taunt. 55 . . . . .	266
— v. — 3 Taunt. 402 . . . . .	76, 118
— v. — 4 Taunt. 887 . . . . .	118, 141, 257
— v. — 5 Taunt. 205; 14 R. R. 742 . . . . .	255
— v. — 8 T. R. 645; 5 R. R. 493 . . . . .	267
— v. Rollings, 4 C. B. 188; 17 L. J. C. P. 568 . . . . .	52
— v. Rosser, 3 East, 15 . . . . .	7
— v. Rowe, 2 C. & P. 245; Ry. & M. 343 . . . . .	112
— v. Rowlands, 9 C. & P. 734 . . . . .	83, 85, 102
— v. Rugeley, 6 Q. B. 107; 8 Jur. 615; 13 L. J. M. C. 137 . . . . .	59, 91
— v. St. Helens, 2 Q. B. 364; 1 G. & D. 663 . . . . .	137
— v. Samples, 8 A. & E. 151; 3 N. & P. 254; 2 Jur. 841 . . . . .	248
— v. Samuel, 5 Esp. 173; 8 R. R. 845 . . . . .	37
— v. Savage, 1 Car. & K. 487 . . . . .	228
— v. Sayer, 3 Camp. 8 . . . . .	48
— v. Scott, 11 East, 478 . . . . .	3
— v. Seaton, 2 C. M. & R. 728; 1 Tyr. & G. 19; 1 Gale, 303 . . . . .	30
— v. Shawcross, 3 B. & C. 752; 5 D. & R. 711 . . . . .	72, 76, 77
— v. Shewin, 3 Camp. 134 . . . . .	57, 94, 114, 231
— v. Sisson, 12 East, 62 . . . . .	237
— v. Skirrow, 7 A. & E. 157; 2 N. & P. 123 . . . . .	27, 28, 29
— v. Smaridge, 7 Q. B. 957; 14 L. J. Q. B. 327; 9 Jur. 781 . . . . .	36
— v. Smith, A. & E. 350; 6 N. & M. 829; 2 H. & W. 176 . . . . .	38, 45
— v. — 2 Stark. 199 . . . . .	147
— v. — 5 Taunt. 795; 1 Marsh. 359; 2 Rose, 280; 15 R. R. 660 . . . . .	80, 81
— v. Smyth, 6 B. & C. 112; 9 D. & R. 136 . . . . .	161
— v. Smythe, 4 M. & S. 347 . . . . .	27, 29, 257
— v. Somerton, 7 Q. B. 58; 14 L. J. Q. B. 210; 9 Jur. 775 . . . . .	230
— v. Spence, 6 East, 120; 2 Smith, 255; 8 R. R. 422 . . . . .	39
— v. Spiller, 6 Esp. 70; 9 R. R. 810 . . . . .	45
— v. Spry, 1 B. & Ald. 617 . . . . .	88, 91
— v. Stacey, 6 C. & P. 139 . . . . .	26, 227, 228
— v. Stagg, 5 B. N. C. 564 . . . . .	53
— v. Standish, 2 Dowl. N. S. 26; 6 Jur. 716 . . . . .	267
— v. Stanion, 1 M. & W. 695; 2 Gale, 154 . . . . .	51, 52
— v. Stanton, 2 B. & Ald. 371; Chit. 118 . . . . .	189
— v. Staple, 2 T. R. 684 . . . . .	1, 3
— v. Stapleton, 3 C. & P. 275 . . . . .	38
— v. Steel, 1 Dowl. 359 . . . . .	141
— v. — 3 Camp. 115; 13 R. R. 768 . . . . .	45
— v. Stennett, 2 Esp. 717; 5 R. R. 769 . . . . .	49
— v. Stephens, 6 Q. B. 208; 13 L. J. Q. B. 350; 8 Jur. 951 . . . . .	93
— v. Stevens, 3 B. & Ad. 299 . . . . .	53
— v. Stevenson, 3 B. & P. 22 . . . . .	267
— v. Stone, 3 C. B. 176; 15 L. J. C. P. 234; 10 Jur. 490 . . . . .	136
— v. Stradling, 2 Stark. 187 . . . . .	189
— v. Sturges, 7 Taunt. 217; 2 Marsh. 505 . . . . .	235

	PAGE
Doe v. Suckermore, 5 A. & E. 703; 2 N. & P. 16; 4 Jur. 607 . . .	248
— v. Summersett, 1 B. & Ad. 135 . . . . .	41
— v. Sumner, 14 M. & W. 39; 14 L. J. Ex. 337; 9 Jur. 413 . . .	205, 224
— v. Sutton, 9 C. & P. 706 . . . . .	84, 112
— v. Tatchell, 3 B. & Ad. 875 . . . . .	162
— v. Terry, 4 A. & E. 274; 5 N. & M. 556 . . . . .	40, 41, 180
— v. Thomas, 6 Exch. 854; 20 L. J. Ex. 367 . . . . .	47, 48
— v. ——— 9 B. & C. 288; 4 M. & Ry. 218 . . . . .	128
— v. Thompson, 13 Q. B. 670; 18 L. J. Q. B. 826 . . . . .	186, 187
— v. ——— 5 A. & E. 532; 1 N. & P. 215 . . . . .	52
— v. ——— 6 A. & E. 721; 2 N. & P. 656 . . . . .	203
— v. ——— 9 Q. B. 1037; 11 Jur. 1007 . . . . .	33, 184
— v. Thorn, 1 M. & S. 425; 14 R. R. 485 . . . . .	148
— v. Tidbury, 14 C. B. 304; 23 L. J. C. P. 57; 18 Jur. 468; 2 C. L. R. 347 . . . . .	38
— v. Timothy, 2 C. & K. 351 . . . . .	39
— v. Tom, 4 Q. B. 615; 12 L. J. Q. B. 264; 7 Jur. 847; 3 G. & D. 637 . . . . .	182
— v. Tomkinson, 2 M. & S. 165 . . . . .	153
— v. Tressidder, 1 Q. B. 416; 10 L. J. Q. B. 160; 5 Jur. 931; 1 G. & D. 70 . . . . .	129
— v. Trueman, 1 B. & Ad. 736 . . . . .	184, 185, 186
— v. Turford, 3 B. & Ad. 890 . . . . .	230
— v. Turner, 7 M. & W. 226; 9 <i>id.</i> 648 . . . . .	204
— v. Ulph, 13 Q. B. 204; 18 L. J. Q. B. 106; 13 Jur. 276 . . .	94
— v. Vickers, 4 A. & E. 782; 6 N. & M. 437 . . . . .	136
— v. Vince, 2 Camp. 257 . . . . .	39
— v. Walker, 14 L. J. Q. B. 181 . . . . .	47, 236
— v. ——— B. & C. 111; 7 D. & R. 487 . . . . .	128
— v. Walters, 10 B. & C. 626; 5 M. & Ry. 357 . . . . .	40, 236
— v. Wandlass, 7 T. R. 117; 4 R. R. 393 . . . . .	74
— v. Watkins, 7 East, 551; 3 Smith, 517; 8 R. R. 670 . . . .	39
— v. Watson, 2 Stark. 230 . . . . .	32
— v. Watt, 8 B. & C. 303; 1 M. & Ry. 694 . . . . .	54, 55, 56, 69
— v. Weaver, 2 C. & K. 754 . . . . .	174
— v. Webber, 3 B. N. C. 922; 5 Scott, 189; 3 Hodg. 203 . . .	1, 136
— v. Webster, 12 A. & E. 442; 4 P. & D. 270 . . . . .	181
— v. Wells, 10 A. & E. 427; 2 P. & D. 396 . . . . .	52
— v. Wharton, 8 T. R. 2 . . . . .	3, 148
— v. Wheeler, 15 M. & W. 623; 16 L. J. Ex. 312 . . . . .	162, 163
— v. Whichelo, 8 T. R. 211 . . . . .	167
— v. Whitcomb, 8 Bing. 46 . . . . .	191, 192
— v. White, 2 D. & R. 716 . . . . .	49
— v. ——— 4 Bing. 276; 12 Moore, 526 . . . . .	61
— v. Whitehead, 8 A. & E. 571; 2 Jur. 493; 3 N. & P. 557 . .	69, 231
— v. Whittick, Gow. 195 . . . . .	52
— v. Wiggins, 4 Q. B. 367; 12 L. J. Q. B. 177; 7 Jur. 529; 3 G. & D. 504 . . . . .	25, 30

## TABLE AND INDEX OF CASES.

xxxi

	PAGE
Doe v. Wilkinson, 12 A. & E. 748; 4 P. & D. 823 . . . . .	45
— v. Williams, 6 B. & C. 41; 9 D. & R. 30 . . . . .	26, 42,
	232
— v. ——— 2 M. & W. 749; 1 Jur. 755 . . . . .	1, 3
— v. ——— 7 C. & P. 822 . . . . .	53, 109
— v. ——— 5 B. & Ad. 783 . . . . .	68
— v. ——— 5 A. & E. 291; 6 N. & M. 816; 2 H. & W. 213 . . . . .	220
— v. Wilson, 2 Stark. 477 . . . . .	266
— v. ——— 5 B. & Ald. 863 . . . . .	77
— v. Withers, 2 B. & Ad. 896 . . . . .	83
— v. Wittcomb, 6 Exch. 601; 4 H. L. C. 425 . . . . .	250
— v. Wolley, 8 B. & C. 22; 3 C. & P. 402; 2 M. & Ry. 195 . . . . .	168, 239,
	242, 247
— v. Wood, 2 B. & Ald. 724 . . . . .	9, 10, 68
— v. ——— 14 M. & W. 682; 15 L. J. Ex. 41; 9 Jur. 1060 . . . . .	35, 162
— v. Woodbridge, 9 B. & C. 376; 4 M. & Ry. 302 . . . . .	92, 113
— v. Woodman, 8 East, 228; 9 R. R. 422 . . . . .	42, 43
— v. Woodroffe, 10 M. & W. 608; 15 <i>id.</i> 769; 12 L. J. Ex. 147; . . . . .	
2 H. L. C. 811; 13 Jur. 1013 . . . . .	10
— v. Woombwell, 2 Camp. 559 . . . . .	39
— v. Woraley, 1 Camp. 20 . . . . .	77
— v. Wright, 10 A. & E. 763; 2 P. & D. 672 . . . . .	191
— v. Wrighte, 2 B. & Ald. 710 . . . . .	3
— v. Wrightman, 4 Esp. 5; 6 R. R. 834 . . . . .	38, 42, 44
— v. Wroot, 5 East, 132; 1 Smith, 363 . . . . .	1
Doherty v. Allman, 3 App. Cas. 709; 39 L. T. 129; 26 W. R. 513 . . . . .	87,
	93
Dolby v. Isles, 11 A. & E. 335; 4 Jur. 432 . . . . .	27
Don, <i>Re</i> , 4 Drew. 194; 27 L. J. Ch. 98; 3 Jur. N. S. 1192 . . . . .	169
Donellan v. Read, 3 B. & Ad. 899 . . . . .	66
Dormer's Case, 5 Co. Rep. 40 a; Poph. 22 . . . . .	73
Dormer v. Fortescue, 3 Atk. 123 . . . . .	196
Dougal v. McCarthy, [1893] 1 Q. B. 736; 62 L. J. Q. B. 462; 68 . . . . .	
L. T. 699; 41 W. R. 484; 4 R. 402 . . . . .	50
Doughty v. Bowman, 11 Q. B. 444; 17 L. J. Q. B. 111; 12 Jur. 182 . . . . .	65
Douse v. Earle, 3 Lev. 264; 2 Vent. 126 . . . . .	85
Downingham's Case, Owen, 17 . . . . .	129, 188
Downs v. Cooper, 2 Q. B. 256; 6 Jur. 622 . . . . .	33
Drake, <i>Ex parte</i> , 1 M. D. & De G. 539 . . . . .	80
Driver v. Lawrence, 2 W. Bl. 1259 . . . . .	28, 29
Drummond v. Sant, L. R. 6 Q. B. 763; 41 L. J. Q. B. 21; 25 L. T. . . . .	
419; 20 W. R. 18 . . . . .	215, 216
Drury v. Fitch, Hutton, 16 . . . . .	177
Duke v. Ashby, 7 H. & N. 600; 31 L. J. Ex. 168; 10 W. R. 273; . . . . .	
8 Jur. N. S. 236 . . . . .	28
Dunn v. Large, 3 Doug. 335 . . . . .	192
Duppa v. Mayo, 1 Wms. Saunders, 275 d. . . . .	112
Dwyer v. Collins, 7 Exch. 639; 21 L. J. Ex. 225; 16 Jur. 569 . . . . .	250, 251

	PAGE
Dyke, <i>Ex parte</i> , <i>Re</i> , Morrish, 22 Ch. D. 410 ; 48 L. T. 303 . . . . .	68
Dyne v. Nutley, 14 C. B. 122 ; 2 C. L. R. 81 . . . . .	230
 EAGER v. Furnivall, 17 Ch. D. 115 ; 50 L. J. Ch. 537 ; 44 L. T. 464 ; 29 W. R. 649 ; 45 J. P. 603 . . . . .	161
East v. Harding, Cro. Eliz. 498 . . . . .	185, 186
Easton v. Penny, 67 L. T. 290 . . . . .	51
— v. Pratt, 2 H. & C. 676 ; 33 L. J. Ex. 31, 233 ; 9 L. T. 841 ; 12 W. R. 805 ; 10 Jur. N. S. 732 . . . . .	82
Ecclesiastical Commissioners v. N. E. R., 4 Ch. D. 845 ; 47 L. J. Ch. 20 ; 36 L. T. 174 . . . . .	217
Ecclesiastical Commissioners v. Rowe, 5 App. Cas. 736 ; 49 L. J. Q. B. 771 ; 43 L. T. 353 ; 29 W. R. 159 ; 45 J. P. 36 . . . . .	201, 223
Ecclesiastical Commissioners v. Treemer, [1893] 1 Ch. 166 ; 62 L. J. Ch. 119 ; 68 L. T. 11 ; 41 W. R. 166 ; 3 R. 136 . . . . .	201
Edwards, <i>Ex parte</i> , 3 Atk. 519 . . . . .	175
Edwards v. Hodges, 15 C. B. 477 ; 24 L. J. M. C. 481 ; 1 Jur. N. S. 91 ; 3 C. L. R. 472 . . . . .	285
Edwick v. Hawkes, 18 Ch. D. 199 ; 50 L. J. Ch. 577 ; 45 L. T. 168 ; 29 W. R. 913 . . . . .	10, 13, 15, 102
Egremont v. Keene, 2 Jones, Ir. Ex. 307 . . . . .	62
Elias v. Snowdon Co., 4 App. Cas. 454 ; 48 L. J. Ch. 811 ; 41 L. T. 289 ; 28 W. R. 54 . . . . .	93
Elliott v. Elliott, 9 M. & W. 23 . . . . .	235
— v. Johnson, L. R. 2 Q. B. 120 ; 36 L. J. Q. B. 44 ; 8 B. & S. 33 ; 15 W. R. 253 . . . . .	61
Ellis's Case, Cro. Jac. 634 . . . . .	17
Ellis v. Peachy, 5 D. & L. 675 ; 18 L. J. Q. B. 137 ; 13 Jur. 564 . . . . .	275
Elston v. Rose, L. R. 4 Q. B. 4 ; 9 B. & S. 509 ; 38 L. J. Q. B. 6 ; 19 L. T. 280 ; 17 W. R. 52 . . . . .	269
Elvis v. York, Hob. 322 . . . . .	202
Emery v. Barnett, 4 C. B. N. S. 423 ; 27 L. J. C. P. 216 ; 4 Jur. N. S. 634 . . . . .	234, 275
Emmerson v. Ind, 33 Ch. D. 323 ; 12 App. Cas. 300 ; 55 L. T. 422 ; 56 <i>id.</i> 778 ; 55 L. J. Ch. 903 ; 56 <i>id.</i> 989 ; 34 W. R. 778 ; 36 <i>id.</i> 243 . . . . .	265
England v. Slade, 4 T. R. 682 ; 2 R. R. 498 . . . . .	31
Erne v. Armstrong, 20 W. R. 370 ; 6 Ir. Rep. C. L. 279 . . . . .	40
Evans v. Bicknell, 6 Ves. 173 ; 5 R. R. 245 . . . . .	3
— v. Davis, 10 Ch. D. 747 ; 48 L. J. Ch. 22 ; 39 L. T. 391 ; 27 W. R. 285 . . . . .	58, 68, 91, 112
— v. Elliott, 9 A. & E. 342 ; 1 P. & D. 256 . . . . .	130, 133, 134, 135
— v. Thomas, Cro. Jac. 172 . . . . .	131
— v. Wyatt, 43 L. T. 176 ; 44 J. P. 767 . . . . .	113
Evelyn v. Evelyn, 42 L. T. 248 ; 28 W. R. 531 . . . . .	262
— v. Raddish, 7 Taunt. 411 . . . . .	84
Exton v. Scott, 6 Sim. 31 . . . . .	250



## TABLE AND INDEX OF CASES.

xxxiii

	PAGE
<i>Eyre v. Shaftesbury</i> , 2 P. Wms. 103 . . . . .	175
<i>Eyston, Ex parte</i> , 7 Ch. D. 145; 47 L. J. Bank. 62; 37 L. T. 447; 26 W. R. 181 . . . . .	100
<i>FABIAN v. Winston</i> , Cro. Eliz. 209 . . . . .	74
<i>Fairclain v. Shamtitle</i> , 3 Burr. 1290 . . . . .	257
<i>Fairclough v. Marshall</i> , 4 Ex. D. 37; 48 L. J. Ex. 146; 39 L. T. 389; 27 W. R. 145 . . . . .	137
<i>Fairtitle v. Gilbert</i> , 2 T. R. 169; 1 R. R. 455 . . . . .	137
<i>Farrelly v. Robins</i> , Ir. Rep. 3 C. L. 284 . . . . .	48
<i>Fasset v. Brown</i> , 1 Peake, 23 . . . . .	247
<i>Fearon v. Norvall</i> , 5 D. & L. 439; 17 L. J. Q. B. 161; 13 Jur. 325 . . . . .	275
<i>Feilden v. Slater</i> , 7 Eq. 523; 38 L. J. Ch. 379 . . . . .	90
<i>Felton v. Ash</i> , Barn. 177 . . . . .	140
<i>Fenn v. Bittleston</i> , 7 Exch. 152; 21 L. J. Ex. 41 . . . . .	131
— <i>v. Smart</i> , 12 East, 444 . . . . .	60, 63
<i>Fenner v. Duplock</i> , 2 Bing. 10; 9 Moore, 38 . . . . .	30, 31, 32
<i>Fenwick, Re</i> , L. R. 1 P. & D. 319; 36 L. J. Prob. 54; 16 L. T. 124 . . . . .	155
<i>Feret v. Hill</i> , 15 C. B. 207; 23 L. J. C. P. 185; 18 Jur. 1014; 2 C. L. R. 1366 . . . . .	28, 129
<i>Ferguson v. Ferguson</i> , 2 Esp. 589 . . . . .	94
<i>Ferrer v. Oven</i> , 7 B. & C. 427; 1 M. & Ry. 222 . . . . .	251
<i>Few v. Perkins</i> , L. R. 2 Ex. 92; 36 L. J. Ex. 54; 16 L. T. 62; 15 W. R. 713 . . . . .	87, 110
<i>Fielden v. Tattersall</i> , 7 L. T. 718 . . . . .	103
<i>Filbee v. Hopkins</i> , 6 D. & L. 264 . . . . .	140
<i>Finch v. Throckmorton</i> , Cro. Eliz. 221 . . . . .	107
— <i>v. Underwood</i> , 2 Ch. D. 310; 45 L. J. Ch. 522; 34 L. T. 779; 24 W. R. 657 . . . . .	108
<i>Fishmongers Co. v. Dimadale</i> , 6 C. B. 896 . . . . .	248
<i>Fitchet v. Adams</i> , 2 Str. 1128 . . . . .	9
<i>Fitz v. Iles</i> , [1893] 1 Ch. 77; 62 L. J. Ch. 258; 68 L. T. 108 . . . . .	91, 92
<i>Fitzgerald v. Day</i> , 6 L. R. Ir. 326 . . . . .	283
— <i>v. Elsee</i> , 2 Camp. 635 . . . . .	247, 248
<i>Fitzroy, Re</i> , 1 Sw. & Tr. 133 . . . . .	155
<i>Fleetwood v. Hull</i> , 23 Q. B. D. 35; 53 L. J. Q. B. 341; 60 L. T. 790; 37 W. R. 714; 54 J. P. 229 . . . . .	91, 123
<i>Fleming v. Gooding</i> , 10 Bing. 549; 4 Moo. & Sc. 455 . . . . .	28
— <i>v. Snook</i> , 5 Beav. 250 . . . . .	104
<i>Foley v. Addenbrooke</i> , 13 M. & W. 174; 14 L. J. Ex. 169 . . . . .	105
<i>Ford's Case</i> , Cro. Jac. 151 . . . . .	24
<i>Ford v. Ager</i> , 2 H. & C. 279; 32 L. J. Ex. 269; 8 L. T. 546; 11 W. R. 1073; 9 Jur. N. S. 804 . . . . .	222
— <i>v. Grey</i> , 1 Salk. 235 . . . . .	208
<i>Forster v. Patterson</i> , 17 Ch. D. 132; 50 L. J. Ch. 603; 44 L. T. 465; 29 W. R. 463 . . . . .	210, 220
<i>Foster v. Pointer</i> , 9 C. & P. 718 . . . . .	251

	PAGE
Foster v. Reeves, [1892] 2 Q. B. 255; 61 L. J. Q. B. 763; 67 L. T. 537; 40 W. R. 695; 57 J. P. 23 . . . . .	2
Foundling Hospital v. Garrett, 47 L. T. 230 . . . . .	106
Fox v. Oakley, 2 Peake, 214 . . . . .	183
— v. Swann, Styles, 482 . . . . .	81
Frances' Case, 8 Co. Rep. 92 a. . . . .	63
Francis v. Hayward, 20 Ch. D. 773; 22 <i>Id.</i> 177; 52 L. J. Ch. 12, 291; 46 L. T. 659; 48 <i>Id.</i> 297; 30 W. R. 744; 31 <i>Id.</i> 488 . . . . .	229
Freeman v. Steggall, 14 Q. B. 202; 19 L. J. Q. B. 18; 13 Jur. 1030 . . . . .	248
Freme v. Clement, 18 Ch. D. 499; 53 L. J. Ch. 801; 44 L. T. 399; 30 W. R. 1 . . . . .	157
French v. French, 1 Dick. 268 . . . . .	241
Friend v. Shaw, 20 Q. B. D. 374; 57 L. J. Q. B. 225; 53 L. T. 89; 36 W. R. 236; 52 J. P. 438 . . . . .	276
Fulder, <i>Ex parte</i> , 8 Dowl. 535; 4 Jur. 507 . . . . .	21, 284
Furley v. Wood, 1 Esp. 198 . . . . .	39
Furnivall v. Grove, 8 C. B. N. S. 496; 30 L. J. C. P. 3 . . . . .	46
Fursdon v. Clogg, 10 M. & W. 572 . . . . .	210
 GALE v. Bates, 3 H. & C. 84; 33 L. J. Ex. 235; 10 L. T. 304; 12 W. R. 715; 10 Jur. N. S. 734 . . . . .	103
Gange v. Lockwood, 2 F. & F. 115 . . . . .	86, 112
Garbutt v. Fawcus, 1 Ch. D. 155; 45 L. J. Ch. 133; 33 L. T. 617; 24 W. R. 89 . . . . .	143
Gardner v. Gardner, 2 App. Cas. 723 . . . . .	243, 244
— v. Ingram, 61 L. T. 729; 54 J. P. 311 . . . . .	44
Garland v. Mead, L. R. 6 Q. B. 441; 40 L. J. Q. B. 179; 24 L. T. 421; 19 W. R. 1156 . . . . .	152, 186, 187
Garrard v. Tuck, 8 C. B. 231; 18 L. J. C. P. 338; 13 Jur. 871 . . . . .	3, 200 205, 216
Garth v. Thomas, 2 Sim. & St. 188 . . . . .	142
Garton v. G. W. R., E. B. & E. 837; 28 L. J. Q. B. 321; 5 Jur. N. S. 1244 . . . . .	43
General Finance Co. v. Liberator, 10 Ch. D. 15; 39 L. T. 600; 27 W. R. 210 . . . . .	1, 136, 137
General Share Co. v. Wetley, 20 Ch. D. 260; 30 W. R. 445 . . . . .	265
German v. Chapman, 7 Ch. D. 271; 47 L. J. Ch. 250; 37 L. T. 685; 26 W. R. 149 . . . . .	89
Gery v. Redman, 1 Q. B. D. 161; 45 L. J. Q. B. 267; 24 W. R. 270 . . . . .	26, 229
Gibbins v. Buckland, 1 H. & C. 736; 42 L. J. Ex. 156; 8 L. T. 87; 11 W. R. 380; 9 Jur. N. S. 207 . . . . .	32
Gibbs v. Cruikshank, L. R. 8 C. P. 454; 42 L. J. C. P. 273; 28 L. T. 735; 21 W. R. 734 . . . . .	131, 134, 135
Gibson v. Doeg, 2 H. & N. 615; 27 L. J. Ex. 37 . . . . .	114
— v. Wells, 1 N. R. 290 . . . . .	94
Gilbert v. Schwanck, 14 M. & W. 488; 14 L. J. Ex. 317; 9 Jur. 693 . . . . .	175

	PAGE
Gillies v. Smither, 2 Stark. 528 . . . . .	247
Glenister v. Harding, 29 Ch. D. 985; 53 L. T. 528 . . . . .	244, 245
Glover v. Cope, 4 Mod. 80; 3 Levintz, 326; Carth. 205; Skin. 305 . . . . .	62
Goodall v. Skerratt, 24 L. J. Ch. 323; 3 Drew. 216; 1 Jur. N. S. 57 . . . . .	213
Goode v. Job, 1 E. & E. 6; 28 L. J. Q. B. 1; 5 Jur. N. S. 145 . . . . .	210
Goodright v. Cator, 2 Doug. 477 . . . . .	69, 73
— v. Cordwent, 6 T. R. 219; 3 R. R. 161 . . . . .	45
— v. Davids, 2 Cowp. 803 . . . . .	112, 114
— v. Moes, 2 Cowp. 591 . . . . .	245
— v. Noright, 2 W. Black. 746 . . . . .	72
— v. Saul, 4 T. R. 356; 2 R. R. 409 . . . . .	244
Goodtitle v. Badtitle, 4 Taunt. 820; 14 R. R. 674 . . . . .	255
— v. Biahop, 1 Y. & J. 344 . . . . .	140, 141
— v. Herbert, 4 T. R. 680 . . . . .	47
— v. Jones, 7 T. R. 43 . . . . .	1
— v. Lonsdown, 3 Anstr. 937 . . . . .	140
— v. Morse, 3 T. R. 365; 1 R. R. 719 . . . . .	33
— v. Pope, 7 T. R. 185 . . . . .	140
— v. Saville, 16 East, 87; 14 R. R. 305 . . . . .	56
— v. Southern, 5 M. & S. 299; 14 R. R. 435 . . . . .	239
— v. Tombs, 3 Wils. 118 . . . . .	192
— v. Wood, Willes, 211 . . . . .	153, 168
— v. Woodward, 3 B. & Ald. 689 . . . . .	40
Gordon v. Secretan, 8 East, 548 . . . . .	248
Gorely, <i>Ex parte</i> , <i>Re</i> Barker, 4 De G. J. & S. 477; 34 L. J. Bank. 1; 11 L. T. 319; 13 W. R. 60; 10 Jur. N. S. 1085 . . . . .	64, 95
Goring v. Warner, 7 Vin. 85; 2 Eq. Cas. Abr. 100 . . . . .	81
Gorton v. Gregory, 3 B. & S. 90 . . . . .	66
Gosset v. Campbell, W. N. 1877, p. 134. . . . .	264
Gould, <i>Ex parte</i> , <i>Re</i> Walker, 13 Q. B. D. 454; 51 L. T. 368; 1 M. B. R. 168 . . . . .	55, 100, 120
Gouldsworth v. Knights, 11 M. & W. 337; 12 L. J. Ex. 283 . . . . .	27
Gourlay v. Somerset, 1 V. & B. 68; 13 R. R. 234 . . . . .	80
Graham v. Wade, 16 East, 29 . . . . .	97, 98
Grant v. Ellis, 9 M. & W. 113 . . . . .	198, 225
Gravenor v. Woodhouse, 2 Bing. 71; 7 Moore, 289. . . . .	30
Gray v. Bompas, 11 C. B. N. S. 520; 5 L. T. 841 . . . . .	46
G. W. R. v. Smith, 2 Ch. D. 235; 3 App. Cas. 165; 45 L. J. Ch. 235; 47 <i>id.</i> 97; 34 L. T. 267; 37 <i>id.</i> 645; 24 W. R. 443; 26 <i>id.</i> 130 . . . . .	68
Greaves v. Greenwood, 2 Ex. D. 239; 46 L. J. Ex. 252; 45 <i>id.</i> 795; 25 W. R. 639; 24 <i>id.</i> 926; 36 L. T. 1; 35 <i>id.</i> 65 . . . . .	168, 241, 242
Green's Case, Cro. Eliz. 3. . . . .	109, 110
Green v. Bridges, 4 Sim. 96 . . . . .	127
— v. Eales, 2 Q. B. 225; 1 G. & D. 468 . . . . .	84, 85
— v. Goddard, 2 Salk. 64 . . . . .	17
— v. Low, 22 Beav. 625; 2 Jur. N. S. 848. . . . .	95

	PAGE
Green v. Marsh, [1892] 2 Q. B. 330; 61 L. J. Q. B. 442; 66 L. T. 430; 40 W. R. 449; 56 J. P. 839 . . . . .	132
Greenaway v. Adams, 12 Ves. 395 . . . . .	77
— v. Hart, 14 C. B. 340; 23 L. J. C. P. 115; 2 C. L. R. 370; 18 Jur. 449 . . . . .	28, 62, 64
Greenslade v. Tapscott, 1 C. M. & R. 55; 4 Tyr. 466 . . . . .	80
Greenway v. Greenway, 1 Giff. 181; 2 De G. F. & J. 128; 5 Jur. N. S. 884 . . . . .	160
Greenwood, Re, [1892] Prob. 7; 61 L. J. Prob. 56; 66 L. T. 61 . . . . .	156
Gregg v. Cotes, 23 Beav. 33; 2 Jur. N. S. 964 . . . . .	84
Gregory v. Doidge, 3 Bing. 474; 11 Moore, 394 . . . . .	29, 30
— v. Wilson, 9 Hare, 683; 16 Jur. 304 . . . . .	111, 127
Grellier v. Neale, 1 Peake, 146; 3 R. R. 669 . . . . .	248, 249
Gresham v. Roosa, W. N. 1870, p. 119 . . . . .	43
Griffin v. Tomkins, 42 L. T. 359; 44 J. P. 457 . . . . .	92, 109
Grimman v. Legge, 8 B. & C. 324; 2 M. & Ry. 438 . . . . .	51
Grimwood v. Moss, L. R. 7 C. P. 360; 41 L. J. C. P. 239; 27 L. T. 268; 20 W. R. 972 . . . . .	68, 109, 113
Gudgen v. Bessel, 6 E. & B. 986; 26 L. J. Q. B. 36; 3 Jur. N. S. 212; 5 W. R. 47 . . . . .	250
Gutteridge v. Munyard, 1 M. & Rob. 334; 7 C. & P. 129 . . . . .	82, 83, 89
 HARRIS v. Guthrie, 18 Q. B. D. 818; 53 L. J. Q. B. 521; 51 L. T. 645; 33 W. R. 99; 48 J. P. 756 . . . . .	241, 245
Haldane v. Johnson, 8 Exch. 689; 22 L. J. Ex. 264; 17 Jur. 937 . . . . .	72
— v. Newcomb, 12 W. R. 135; 9 L. T. 420 . . . . .	82
Hall v. Bainbridge, 12 Q. B. 699; 12 Jur. 795; 17 L. J. Q. B. 317 . . . . .	249
— v. Burgess, 5 B. & C. 332; 8 D. & R. 67 . . . . .	233
— v. Butler, 10 A. & E. 294; 2 P. & D. 374; 8 L. J. Q. B. 239 . . . . .	30
— v. Comfort, 18 Q. B. D. 11; 56 L. J. Q. B. 185; 55 L. T. 550; 35 W. R. 48 . . . . .	132, 254
— v. Hall, 47 L. J. Ch. 680 . . . . .	265
Hammond v. Colls, 1 C. B. 916; 14 L. J. C. P. 288; 3 D. & L. 164 . . . . .	65, 104
— v. Mather, 3 F. & F. 151 . . . . .	233
Hamp v. Robinson, 16 L. T. 29 . . . . .	244
Hanbury v. Cundy, 58 L. T. 155 . . . . .	57, 58
Hanson v. Boothman, 13 East, 22 . . . . .	105
Hardy v. Seyer, Cro. Eliz. 414 . . . . .	56
Hare v. Elms, [1893] 1 Q. B. 604; 62 L. J. Q. B. 187; 68 L. T. 223; 41 W. R. 297; 57 J. P. 309; 5 R. 189 . . . . .	116, 119
— v. Horton, 5 B. & Ad. 715 . . . . .	250
Hargrave v. Hargrave, 9 Beav. 552; 23 id. 484 . . . . .	243, 244
Harlock v. Ashberry, 19 Ch. D. 539; 61 L. J. Ch. 394; 46 L. T. 856; 30 W. R. 327 . . . . .	221, 261

	PAGE
Harman v. Rees Powell, 65 L. T. 255; 60 L. J. Q. B. 628; 56 J. P. 150 . . . . .	91
Harrington v. Wise, Cro. Eliz. 486 . . . . .	55
Harris v. Davison, 15 Sim. 128; 15 L. J. Ch. 255; 10 Jur. 257 . . . . .	145, 268
— v. Jones, 1 M. & Rob. 173 . . . . .	83, 84
— v. Mulkern, 1 Ex. D. 31; 45 L. J. Ex. 244; 34 L. T. 99; 24 W. R. 208 . . . . .	191
— v. Pugh, 4 Bing. 335; 12 Moore, 577 . . . . .	143
Harrison v. Barrow, 63 L. T. 834; 39 W. R. 250 . . . . .	78, 79
— v. Blades, 3 Camp. 457 . . . . .	229, 247
— v. Good, 11 Eq. 338; 40 L. J. Ch. 294; 24 L. T. 263; 19 W. R. 346 . . . . .	90
Hartley v. Hudson, 4 C. P. D. 367; 48 L. J. C. P. 751 . . . . .	65, 66, 99
— v. Pehall, 1 Peake, 178; 3 R. R. 668 . . . . .	66
Hartahorne v. Watson, 4 B. N. C. 178; 5 Scott, 506; 2 Jur. 155; 6 Dowl. 404 . . . . .	67
Harvey v. Baker, 2 Dowl. N. S. 75; 6 Jur. 605 . . . . .	267
— v. Brydges, 14 M. & W. 437; 14 L. J. Ex. 272; 3 D. & L. 55; 9 Jur. 759 . . . . .	10, 11
— v. Mitchell, 2 M. & Rob. 366 . . . . .	250, 267
Harvie v. Oswel, Cro. Eliz. 553, 572. . . . .	108, 113
Hassell v. Gowthaite, Willes, 500 . . . . .	73, 74, 174
Hastings Union v. St. James, L. R. 1 Q. B. 38; 35 L. J. M. C. 65; 6 B. & S. 914; 13 L. T. 362; 14 W. R. 175; 11 Jur. N. S. 977 . . . . .	86
Hatton v. Haywood, 9 Ch. 229; 43 L. J. Ch. 372; 29 L. T. 385; 30 id. 279; 22 W. R. 53, 356. . . . .	145, 146
Havens v. Middleton, 10 Hare, 641; 22 L. J. Ch. 746; 17 Jur. 271 . . . . .	95
Haverhill v. Hare, Cro. Jac. 510 . . . . .	173, 174
Hawes v. Draeger, 23 Ch. D. 173; 52 L. J. Ch. 449; 48 L. T. 518; 31 W. R. 576 . . . . .	243, 244.
Hawksbee v. Hawksbee, 11 Hare, 280; 23 L. J. Ch. 521 . . . . .	199
Hayne v. Cummings, 16 C. B. N. S. 421; 10 L. T. 341; 10 Jur. N. S. 778 . . . . .	56
Heath v. Crealock, 18 Eq. 215; 10 Ch. 22; 44 L. J. Ch. 157; 43 id. 169; 31 L. T. 650; 29 id. 763; 23 W. R. 95 . . . . .	136
— v. Pryn, 1 Vent. 14 . . . . .	238
— v. Pugh, 6 Q. B. D. 345; 7 App. Cas. 235; 50 L. J. Q. B. 473; 44 L. T. 327; 46 id. 321; 29 W. R. 904; 30 id. 553 . . . . .	222
Hemingway v. Fernandes, 13 Sim. 228; 12 L. J. Ch. 130; 7 Jur. 888 . . . . .	65
Hemming v. Blanton, 42 L. J. C. P. 158; 21 W. R. 636. . . . .	221
Henderson v. Mears, 28 L. J. Q. B. 305; 7 W. R. 554; 5 Jur. N. S. 709 . . . . .	234
— v. Squire, 10 B. & S. 183; L. R. 4 Q. B. 170; 38 L. J. Q. B. 73; 19 L. T. 601; 17 W. R. 519 . . . . .	192
Hensman v. Fryer, 3 Ch. 420; 37 L. J. Ch. 97; 17 L. T. 394 . . . . .	157
Hermitage v. Tomkins, 1 Raym. 729 . . . . .	136

	PAGE
<i>Herries v. Griffiths</i> , 2 W. R. 72 . . . . .	138
<i>Hey v. Moorhouse</i> , 6 B. N. C. 52; 8 Scott, 156 . . . . .	9, 10
<i>Heywood v. Heywood</i> , 34 Beav. 317; 34 L. J. Ch. 317; 13 W. R. 514; 11 Jur. N. S. 633 . . . . .	165, 166
<i>Hewitt v. Macartney</i> , 13 Ves. 560 . . . . .	140
<i>Hick, Re</i> , 8 Taunt. 694 . . . . .	252
<i>Hickman v. Isaacs</i> , 4 L. T. 285 . . . . .	90
— <i>v. Machin</i> , 28 L. J. Ex. 310; 4 H. & N. 716; 5 Jur. N. S. 576 . . . . .	184, 135
— <i>v. Upsall</i> , 20 Eq. 136; 4 Ch. D. 144; 46 L. J. Ch. 245; 35 L. T. 919; 23 W. R. 776; 25 <i>id.</i> 175 . . . . .	242
<i>Higginbotham v. Barton</i> , 11 A. & E. 307; 3 P. & D. 194; 4 Jur. 432 . . . . .	136
<i>Higham v. Ridgway</i> , 2 Sm. L. C. 348 (Ed. 9) . . . . .	229
<i>Hildige v. Farrell</i> , 8 L. R. Ir. 158 . . . . .	263
<i>Hill v. Barclay</i> , 16 Ves. 402; 18 <i>id.</i> 56; 11 R. R. 147 . . . . .	127, 136
— <i>v. Cowdery</i> , 1 H. & N. 360; 25 L. J. Ex. 285 . . . . .	100
— <i>v. Edward</i> , 1 C. & E. 431 . . . . .	99
— <i>v. Kempshall</i> , 7 C. B. 975 . . . . .	71, 73
<i>Hills v. Rowland</i> , 4 De G. M. & G. 430; 22 L. J. Ch. 964 . . . . .	103
<i>Hindle v. Pollitt</i> , 6 M. & W. 529 . . . . .	103
<i>Hirst v. Horn</i> , 6 M. & W. 393 . . . . .	38
<i>Hitchman v. Walton</i> , 4 M. & W. 409; 1 H. & H. 374 . . . . .	130
<i>Hoar v. Loe</i> , W. N. 1888, p. 241 . . . . .	261
<i>Hobbs v. Wade</i> , 36 Ch. D. 553; 57 L. J. Ch. 184; 58 L. T. 9; 36 W. R. 445 . . . . .	195, 196, 208
<i>Hobson, Re</i> , 33 Ch. D. 493; 55 L. J. Ch. 754; 55 L. T. 255; 34 W. R. 786 . . . . .	147
<i>Hoby v. Roebuck</i> , 7 Taunt. 156; 2 Marsh. 433 . . . . .	66
<i>Hodgins v. Hickson</i> , 39 L. T. 644 . . . . .	262
<i>Hodgskin v. Queenborough</i> , Willes, 129 . . . . .	234, 262
<i>Hodgson v. Hooper</i> , 3 E. & B. 149; 29 L. J. Q. B. 222; 6 Jur. N. S. 911; 8 W. R. 637 . . . . .	204
<i>Hodle v. Healey</i> , Mad. & G. 181; 1 V. & B. 536 . . . . .	218
<i>Hodson v. Walker</i> , L. R. 7 Ex. 55; 41 L. J. Ex. 51; 25 L. T. 937; 20 W. R. 489 . . . . .	277, 280
<i>Hogan v. Hand</i> , 14 Moore P. C. 310; 4 L. T. 565; 9 W. R. 673 . . . . .	204
<i>Hogg v. Brooks</i> , 15 Q. B. D. 256; 50 J. P. 118 . . . . .	35, 43
— <i>v. Norris</i> , 2 F. & F. 246 . . . . .	41, 228
<i>Holcomb v. Rawlins</i> , Cro. Eliz. 540 . . . . .	192
<i>Holcombe v. Hewson</i> , 2 Camp. 391; 11 R. R. 746 . . . . .	102
<i>Holdfast v. Clapham</i> , 1 T. R. 600; 1 R. R. 309 . . . . .	188
<i>Holford v. Hatch</i> , 1 Doug. 183 . . . . .	79
<i>Holland v. Cole</i> , 1 H. & C. 67; 31 L. J. Ex. 481; 6 L. T. 503; 10 W. R. 563; 8 Jur. N. S. 1066 . . . . .	81
<i>Holmes v. Newlands</i> , 11 A. & E. 44; 3 Q. B. 679; 3 P. & D. 128 . . . . .	194, 224

	PAGE
Holt v. Collyer, 16 Ch. D. 718; 50 L. J. Ch. 311; 44 L. T. 214; 29 W. R. 502; 45 J. P. 456 . . . . .	90
Home Stores v. Todd, 63 L. T. 829 . . . . .	99
Homes v. Pearce, 1 F. & F. 283 . . . . .	228
Hook v. Hook, 1 H. & M. 43; 32 L. J. Ch. 14; 7 L. T. 501; 11 W. R. 105; 9 Jur. N. S. 42 . . . . .	169, 188
Hooper v. Clark, L. R. 2 Q. B. 200; 36 L. J. Q. B. 79; 15 W. R. 347 . . . . .	62, 64, 65
— v. Cooke, 20 Beav. 639; 25 L. J. Ch. 62, 467; 1 Jur. N. S. 949; 2 <i>id.</i> 527 . . . . .	174
Hopcraft v. Keys, 9 Bing. 613; 2 M. & Sc., 760 . . . . .	31
Hopkins, <i>Ex parte</i> , 3 P. Wms. 182 . . . . .	175
Hornidge v. Wilson, 11 A. & E. 645; 3 P. & D. 641 . . . . .	64
Horsefall v. Testar, 7 Taunt. 385; 1 Moore, 89 . . . . .	87
— v. Mather, Holt N. P. 7 . . . . .	94
Horton v. Bott, 2 H. & N. 249; 26 L. J. Ex. 267; 3 Jur. N. S. 568 . . . . .	265
Hovenden v. Annesley, 2 Sch. & Lef. 617 . . . . .	214, 215, 217
How v. Hall, 14 East, 274; 12 R. R. 515 . . . . .	251
Howard v. Shrewsbury, 17 Eq. 378; 43 L. J. Ch. 495; 29 L. T. 863; 22 W. R. 290 . . . . .	2
— v. Smith, 3 M. & Gr. 254; 3 Scott N. R. 574 . . . . .	26
— v. Wemsley, 6 Esp. 53; 9 R. R. 806 . . . . .	39
Howe v. Scarrott, 4 H. & N. 723; 28 L. J. Ex. 325 . . . . .	33
Howitt v. Harrington, [1893] 2 Ch. 497; 62 L. J. Ch. 571; 68 L. T. 703; 41 W. R. 664; 3 R. 568 . . . . .	225
Hubbard v. Lees, L. R. 1 Ex. 255; 35 L. J. Ex. 169; 14 L. T. 442; 4 H. & C. 418 . . . . .	155, 246
Hudson v. Williams, 39 L. T. 632 . . . . .	85
Hughes and Crowther's Case, 13 Co. Rep. 66 . . . . .	50, 56
Hughes v. Metropolitan Rlwy., 1 C. P. D. 120; 2 App. Cas. 439; 45 L. J. C. P. 578; 46 <i>id.</i> 583; 35 L. T. 87; 36 <i>id.</i> 932; 24 W. R. 652; 25 <i>id.</i> 680 . . . . .	111, 116, 127
Hungate v. Gascoigne, 2 Cooper, 405 . . . . .	246
Hunt v. Allgood, 10 C. B. N. S. 253; 30 L. J. C. P. 313; 4 L. T. 215 . . . . .	41
— v. Bishop, 8 Exch. 675; 22 L. J. Ex. 337 . . . . .	57, 65, 111
— v. Cope, 1 Cowp. 242 . . . . .	234
— v. Remnant, 9 Exch. 635; 23 L. J. Ex. 135; 18 Jur. 335 . . . . .	65, 111
Hunter v. Britta, 3 Camp. 455; 14 R. R. 807 . . . . .	191
— v. Miller, 9 L. T. 159 . . . . .	104
Huntley v. Russell, 13 Q. B. 672; 18 L. J. Q. B. 239; 13 Jur. 837 . . . . .	93
Hurst v. Hurst, 4 Exch. 571; 19 L. J. Ex. 410 . . . . .	95, 96, 98
Huson v. Hewson, 5 Ves. 105 . . . . .	140
Hutchins v. Scott, 2 M. & W. 809; M. & H. 194 . . . . .	232
Hutton v. Warren, 1 M. & W. 466; 2 Gale, 71 . . . . .	94
Hyatt v. Griffiths, 17 Q. B. 505 . . . . .	49, 56
Hyde v. Dallaway, 2 Hare, 528 . . . . .	219
— v. Hill, 3 T. R. 377 . . . . .	98

	PAGE
Hyde v. Warden, 3 Ex. D. 72; 47 L. J. Ex. 121; 37 L. T. 567 . . .	58,
	60, 62, 78
— v. Watts, 12 M. & W. 254; 13 L. J. Ex. 41; 1 D. & L. 479 . . .	94
IBBS v. Richardson, 9 A. & E. 849; 1 P. & D. 618; 3 Jur. 102 . . .	192
Inchiquin v. Lyons, 20 L. R. Ir. 474 . . . . .	45
Incorporated Law Soc. v. Richards, 1 Dru. & W. 258 . . . . .	210, 224
Ingilby v. Amcotts, 21 Beav. 585; 25 L. J. Ch. 769; 4 W. R. 433; . . .	
2 Jur. N. S. 556 . . . . .	164, 168
Irish Land Commission v. Grant, 10 App. Cas. 14; L. R. 11 Ir. . . .	
430; 13 <i>id.</i> 478; 52 L. T. 228; 33 W. R. 357 . . . . .	222, 223, 225
Isaacs v. Diamond, W. N., 1880, p. 75 . . . . .	234, 254
Isherwood v. Oldknow, 3 M. & S. 382 . . . . .	62
Ive v. Scott, 9 Dowl. 993; 5 Jur. 552 . . . . .	192
JACKMAN v. Hoddesdon, Cro. Eliz. 351 . . . . .	185
Jackson v. Northampton Trams, 55 L. T. 91 . . . . .	55, 56
Jacobs v. Seward, L. R. 5 H. L. 464; 41 L. J. C. P. 221; 22 L. T. . . .	
690; 27 <i>id.</i> 185; 18 W. R. 953 . . . . .	178
Jacques v. Harrison, 12 Q. B. D. 186, 165; 53 L. J. Q. B. 137; 50 . . .	
L. T. 246; 32 W. R. 274, 470 . . . . .	121
James v. Dean, 11 Ves. 383; 15 <i>id.</i> 286; 8 R. R. 178 . . . . .	48
— v. Salter, 2 B. N. C. 505; 3 <i>id.</i> 544; 2 Scott, 750; 1 Hodges . . .	
405 . . . . .	197, 199, 200, 225
— v. Shrimpton, 1 P. D. 431; 45 L. J. Prob. 85; 35 L. T. 428; . . .	
24 W. R. 740 . . . . .	156
Jayne v. Hughes, 10 Exch. 430; 24 L. J. Ex. 115 . . . . .	210
— v. Price, 5 Taunt. 326; 1 Marsh. 68; 15 R. R. 518 . . . . .	17, 227
Jeffrey v. Neale, L. R. 6 C. P. 240; 40 L. J. C. P. 191; 24 L. T. . . .	
362; 19 W. R. 700 . . . . .	65, 97
Jemmot v. Cooly, 1 Lev. 170; 1 Saund. 112c . . . . .	131
Jenner v. Clegg, 1 M. & Rob. 213 . . . . .	45
Jervis v. Tomkinson, 1 H. & N. 195; 26 L. J. Ex. 41 . . . . .	105
Job v. Banister, 2 K. & J. 374; 26 L. J. Ch. 125; 3 Jur. N. S. 93; . . .	
5 W. R. 177 . . . . .	127
Johnson v. Baker, 4 B. & Ald. 440 . . . . .	249
— v. Hereford, 4 Ad. & E. 520 . . . . .	61, 82, 83
— v. Lawson, 2 Bing. 86; 9 Moore, 183 . . . . .	246
— v. Mason, 1 Esp. 89 . . . . .	28
— v. Warwick, 17 C. B. 516; 25 L. J. C. P. 102 . . . . .	162
Johnstone v. Hall, 2 K. & J. 414; 25 L. J. Ch. 462; 2 Jur. N. S. . . .	
780 . . . . .	89
— v. Hudlestone, 4 B. & C. 922; 7 D. & R. 411 . . . . .	86, 50
Jolly v. Arbuthnott, 4 De G. & J. 224; 28 L. J. Ch. 547; 5 Jur. N. . . .	
S. 689 . . . . .	28, 130, 132



	PAGE
Jones, <i>Ex parte</i> , 4 Y. & C. 466 . . . . .	207
— v. Bone, 9 Eq. 674; 39 L. J. Ch. 405; 23 L. T. 304; 18 W. R. 489 . . . . .	90
— v. Carter, 5 M. & W. 718; 8 Q. B. 134; 15 L. J. Q. B. 97; 10 Jur. 33 . . . . .	67, 68, 113
— v. Chapman, 14 M. & W. 124; 2 D. & L. 907; 14 L. J. Ex. 313 . . . . .	9, 11, 282
— v. Curling, 13 Q. B. D. 262; 53 L. J. Q. B. 378; 50 L. T. 349; 32 W. R. 651 . . . . .	267
— v. Foley, [1891] 1 Q. B. 730; 60 L. J. Q. B. 464; 64 L. T. 538; 39 W. R. 510; 55 J. P. 521 . . . . .	9, 10, 11, 13, 14, 282
— v. Galway, 11 Ir. L. R. 435 . . . . .	249
— v. Green, 3 Y. & J. 298 . . . . .	104
— v. Jones, 16 M. & W. 699; 5 D. & L. 494; 16 L. J. Ex. 299; 11 Jur. 335 . . . . .	209
— v. Marsh, 4 T. R. 464; 2 R. B. 441 . . . . .	42
— v. Mills, 10 C. B. N. S. 788; 31 L. J. C. P. 66; 8 Jur. N. S. 387 . . . . .	37, 52
— v. Murphy, 2 J. & S. 323 . . . . .	42
— v. Owen, 5 D. & L. 669; 18 L. J. Q. B. 8; 13 Jur. 261 . . . . .	274
— v. Phipps, L. R. 3 Q. B. 567; 37 L. J. Q. B. 198; 18 L. T. 813; 9 B. & S. 761; 16 W. R. 1044 . . . . .	40, 44, 236
— v. Shears, 4 A. & E. 832; 2 H. & W. 43; 6 N. & M. 428 . . . . .	105
— v. Thomas, 4 L. T. 210 . . . . .	274
— v. Thorne, 1 B. & C. 715; 3 D. & R. 152 . . . . .	90
— v. Williams, 2 M. & W. 326; 6 L. J. Ex. 107 . . . . .	228
Jordan v. Chowna, 8 Dowl. 709 . . . . .	141
Jumpsen v. Pitchers, 13 Sim. 327 . . . . .	199, 211
 KEARSLEY v. Phillips, 11 Q. B. D. 621; 52 L. J. Q. B. 581; 49 L. T. 435; 31 W. R. 909 . . . . .	132
Keating v. Sparrow, 1 B. & B., Ir. Ch. Rep. 367 . . . . .	124
Keech v. Hall, 1 Doug. 21; 1 Sm. L. C. 546 (9th ed.) . . . . .	130, 131, 134
Keeffe v. Kirby, 6 Ir. C. L. R. 591 . . . . .	199
Keene v. Angel, 5 T. R. 740 . . . . .	267
Kehoe v. Lansdowne, [1893] A. C. 451; 62 L. J. P. C. 97; 57 J. P. 708; 1 R. 294 . . . . .	55
Kelly v. Morray, L. R. 1 C. P. 667; 35 L. J. C. P. 287; 14 L. T. 624; 14 W. R. 939; 12 Jur. N. S. 769 . . . . .	172
— v. Patterrson, L. R. 9 C. P. 681; 43 L. J. C. P. 320; 30 L. T. 842 . . . . .	38, 49
Kemp v. Derrett, 3 Camp. 510; 14 R. R. 820 . . . . .	86
— v. Sober, 1 Sim. N. S. 517; 20 L. J. Ch. 602; 15 Jur. 458 . . . . .	89
Kendrick v. Roberts, 46 L. T. 59; 30 W. R. 365 . . . . .	262
Kennedy v. Lyell, 15 Q. B. D. 491; 53 L. T. 466 . . . . .	210
Kerkin v. Kerkin, 3 E. & B. 399; 18 Jur. 813 . . . . .	275
Kernaghan v. M'Nally, 12 Ir. Ch. Rep. 89 . . . . .	199

	PAGE
<i>Keyse v. Powell</i> , 2 E. & B. 132; 22 L. J. Q. B. 305; 17 Jur. 1052 .	196
<i>Kidner v. Keith</i> , 15 C. B. N. S. 35 . . . . .	249
<i>Kidney v. Cockburn</i> , 2 R. & My. 167 . . . . .	246
<i>Kidwally v. Brand</i> , Plowd. 69 . . . . .	62, 74
<i>Kingsdale v. Mann</i> , 6 Mod. 27 . . . . .	266
<i>Kingston's Case</i> , 2 Sm. L. C. 812 (ed. 9) . . . . .	27
<i>Kinnaird v. Trollope</i> , 39 Ch. D. 636; 57 L. J. Ch. 905; 59 L. T. 433;	
37 W. R. 234 . . . . .	138, 142
<i>Kinnersley v. Orpe</i> , 1 Doug. 56 . . . . .	79
<i>Kinsman v. Jackson</i> , 42 L. T. 80, 558; 28 W. R. 337, 601 . . . . .	105
— <i>v. Rouse</i> , 17 Ch. D. 104; 50 L. J. Ch. 486; 44 L. T. 597;	
29 W. R. 627 . . . . .	210, 220
<i>Kitching v. Kitching</i> , 24 W. R. 901 . . . . .	262
<i>Knight v. Clarke</i> , 15 Q. B. D. 294; 54 L. J. Q. B. 509; 50 J. P.	
84 . . . . .	32, 266
— <i>v. Cox</i> , 18 C. B. 645; 25 L. J. C. P. 314 . . . . .	30
— <i>v. Mory</i> , Cro. Eliz. 60 . . . . .	56
<i>Knipe v. Palmer</i> , 2 Wils. 130 . . . . .	177
<i>Kynnaid v. Leslie</i> , L. R. 1 C. P. 389; 35 L. J. C. P. 226; 14 L. T.	
756; 14 W. R. 761; 12 Jur. N. S. 468 . . . . .	166, 167
 <i>LACEY v. Hill</i> , 19 Eq. 346; 44 L. J. Ch. 215; 32 L. T. 48; 23 W.	
R. 285 . . . . .	152
<i>Lacon v. Hooper</i> , 6 T. R. 224; 1 Esp. 246 . . . . .	182
— <i>v. Tyrrell</i> , W. N. 1887, p. 71; 56 L. T. 483 . . . . .	261
<i>Lake v. Billers</i> , 1 Ld. Ray. 733 . . . . .	147
— <i>v. Currie</i> , 2 De G. M. & G. 536; 16 Jur. 1027 . . . . .	158
<i>Lambert, Re</i> , 56 L. J. Ch. 122; 56 L. T. 15 . . . . .	241, 246
— <i>v. Norris</i> , 2 M. & W. 333; 1 Jur. 24 . . . . .	66
<i>Langdale v. Briggs</i> , 8 De G. M. & G. 391; 3 Sm. & G. 246; 25 L. J.	
Ch. 100; 26 <i>id.</i> 27; 4 W. R. 144, 703; 2 Jur. N. S. 35, 982 .	153, 240
<i>Langridge v. Payne</i> , 2 J. & H. 423; 7 L. T. 23; 10 W. R. 726 . . . . .	139
<i>Latham v. Spedding</i> , 2 L. M. & P. 378; 17 Q. B. 440; 20 L. J. Q.	
B. 302; 15 Jur. 576 . . . . .	275
<i>Lauderdale Peerage</i> , 10 App. Cas. 692 . . . . .	245, 246
<i>Law v. Bagwell</i> , 4 Dr. & War. 398 . . . . .	214, 215
<i>Lawrence v. Hogben</i> , 26 L. J. Ex. 55 . . . . .	142
<i>Lawrie v. Lees</i> , 14 Ch. D. 249; 49 L. J. Ch. 636; 42 L. T. 485; 28	
W. R. 779 . . . . .	114
<i>Leeds v. Cheetham</i> , 1 Sim. 146 . . . . .	85
— <i>v. Cook</i> , 4 Esp. 256; 6 R. R. 355 . . . . .	251
<i>Legge v. Edmonds</i> , 25 L. J. Ch. 125 . . . . .	243, 244, 245
<i>Legh v. Hewitt</i> , 4 East, 154; 7 R. R. 545 . . . . .	94, 103
<i>Leigh v. Jack</i> , 5 Ex. D. 264; 49 L. J. Q. B. 220; 42 L. T. 463; 28	
W. R. 452; 44 J. P. 488 . . . . .	195, 198

## TABLE AND INDEX OF CASES.

xliii

	PAGE
Lehmann v. McArthur, 3 Eq. 746; 3 Ch. 496; 16 L. T. 196; 15 W. R. 551	55, 78, 79
Lepa v. Rogers, [1893] 1 Q. R. 31; 68 L. T. 584; 57 J. P. 55; 5 R. 57	78
Levy, Re, 30 Ch. D. 119; 54 L. J. Ch. 968; 53 L. T. 200; 33 W. R. 893	100
Lewes, Re, 11 Eq. 236; 6 Ch. 356; 40 L. J. Ch. 602; 23 L. T. 692; 24 id. 533; 19 W. R. 195, 617	242
Lewin v. Wilson, 11 App. Cas. 639; 55 L. J. P. C. 75; 55 L. T. 410	221
Lewis v. Fothergill, 5 Ch. 103	105
— v. Thomas, 3 Hare, 26	217
Ley v. Peter, 3 H. & N. 101; 27 L. J. Ex. 239	209, 210
Liddy v. Kennedy, L. R. 5 H. L. 134; 20 W. R. 150	49
Lilley v. Harvey, 17 L. J. Q. B. 357; 5 D. & L. 643; 12 Jur. 1026	275
Limerick v. Limerick, 32 L. J. P. & M. 92; 11 W. R. 503	241
Lisburne v. Davies, L. R. 1 C. P. 259; 35 L. J. C. P. 193; 13 L. T. 795; 14 W. R. 333; 12 Jur. N. S. 340	33, 34
Lister v. Lane, [1893] 2 Q. B. 212; 62 L. J. Q. B. 583; 69 L. T. 176; 41 W. R. 626; 57 J. P. 725; 4 R. 474	83
— v. Pickford, 34 Beav. 576; 34 L. J. Ch. 582; 12 L. T. 587; 13 W. R. 827; 11 Jur. N. S. 649	214
Litchfield v. Ready, 5 Exch. 939; 20 L. J. Ex. 51	128, 190
Llewellyn v. Mackworth, 2 Eq. Cas. Abr. 578	215
Lloyd v. Jones, 6 C. B. 81; 17 L. J. C. P. 206; 5 D. & L. 784; 12 Jur. 657	268, 275
Loader v. Kemp, 2 C. & P. 375	83
Lock v. Pearce, [1893] 2 Ch. 271; 62 L. J. Ch. 582; 68 L. T. 569; 41 W. R. 369; 2 R. 403	121, 125, 126, 127
Locke v. Matthews, 13 C. B. N. S. 753; 32 L. J. C. P. 98; 7 L. T. 824; 11 W. R. 343; 9 Jur. N. S. 875	47, 204, 207
Locking v. Parker, 8 Ch. 30; 42 L. J. Ch. 257; 27 L. T. 635; 21 W. R. 113	216, 220
Lockwood v. Wilson, 43 L. J. C. P. 179; 30 L. T. 761; 22 W. R. 919	97
Lofft v. Dennis, 1 E. & E. 474; 28 L. J. Q. B. 168; 5 Jur. N. S. 727	85
L. & N. W. R. v. Garnett, 9 Eq. 26; 39 L. J. Ch. 25; 21 L. T. 352; 18 W. R. 246	90
— v. West, L. R. 2 C. P. 553; 36 L. J. C. P. 245	28, 32
London Co. v. Field, 16 Ch. D. 645; 50 L. J. Ch. 549; 44 L. T. 444	90
London & Westminster Bank v. L. & N. W. R., [1893] 2 Q. B. 49; 62 L. J. Q. B. 370; 69 L. T. 320; 41 W. R. 670; 5 R. 425	72
Longford v. Eyre, 1 P. Wms. 740	239
Lougher v. Williams, 2 Lev. 92	64
Lovat Peerage, 10 App. Cas. 763	245, 246
Lovelock v. Doncaster, 4 T. R. 122; 3 id. 783	256, 257

	PAGE
Low v. Innes, 4 De G. J. & S. 286 . . . . .	101
Lowe v. Jolliffe, 1 W. Bl. 3:5 . . . . .	139
Lowndes v. Fountain, 11 Exch. 487; 25 L. J. Ex. 49 . . . . .	103
Lows v. Telford, 1 App. Cas. 414; 45 L. J. Q. B. 618; 85 L. T. 69 . . . . .	9, 10, 13, 16, 184
Lowthal v. Tonkina, 2 Eq. Cas. Abr. 380 . . . . .	146
Lowther v. Heaver, 41 Ch. D. 248; 58 L. J. Ch. 482; 60 L. T. 810 . . . . .	
59 <i>id.</i> 631; 37 W. R. 55, 465 . . . . .	2
Lucas v. Dennison, 18 Sim. 584 . . . . .	218
Ludlow, <i>Ex parte</i> , 2 P. Wms. 635; 2 Atk. 407 . . . . .	175
Luker v. Dennis, 7 Ch. D. 227; 47 L. J. Ch. 174; 37 L. T. 827; . . . . .	
26 W. R. 167 . . . . .	102
Lumley v. Metropolitan R. C., 34 L. T. 774 . . . . .	91
Luxmore v. Robson, 1 B. & Ald. 584 . . . . .	84
Lyell v. Kennedy, 8 App. Cas. 217; 20 Ch. D. 484; 52 L. J. Ch. . . . .	
385; 51 <i>id.</i> 409; 48 L. T. 585; 46 <i>id.</i> 752; . . . . .	
31 W. R. 618; 30 <i>id.</i> 493 . . . . .	264, 265
— v. —, 14 App. Cas. 437; 18 Q. B. D. 796; 59 L. J. Q. . . . .	
B. 268; 56 <i>id.</i> 303; 56 L. T. 647; 35 W. R. 725 . . . . .	195, 206, 218, 225, 243
M'CRAW v. Gentry, 3 Camp. 232 . . . . .	247
M'Donnell v. M'Kinty, 10 Ir. L. R. 514 . . . . .	194
M'Intosh v. Fontypridd Co., 61 L. J. Q. B. 164 . . . . .	87
Maddon v. White, 2 T. R. 159; 1 R. R. 453 . . . . .	85, 168
Magdalen Coll. v. A.-G., 6 H. L. C. 189; 26 L. J. Ch. 620; 3 Jur. . . . .	
N. S. 675 . . . . .	214, 216, 225, 226
Magdalen Hospital v. Knotts, 8 Ch. D. 709; 4 App. Cas. 324; 47 . . . . .	
L. J. Ch. 726; 48 <i>id.</i> 579; 38 L. T. 624; 40 <i>id.</i> 466; 26 W. R. . . . .	
141, 640 . . . . .	81, 194, 197, 203, 228
Mahon v. Miles, 30 W. R. 123; 45 L. T. 540 . . . . .	148
Malloon v. Fitzgerald, 3 Mod. 29 . . . . .	203
Mallory's Case, 5 Co. Rep. 111 b. . . . .	63
Manby v. Bewicke, 3 K. & J. 342 . . . . .	217
Manchester Warehouse v. Carr, 5 C. P. D. 507; 49 L. J. C. P. 809; . . . . .	
43 L. T. 476; 29 W. R. 354 . . . . .	85, 93
Manchester & Liverpool Bank v. Parkinson, 22 Q. B. D. 173; 58 . . . . .	
L. J. Q. B. 262; 60 L. T. 258; 37 W. R. 264 . . . . .	149
Mandeville's Case, Co. Lit. 26 b. . . . .	166
Manisty v. Kenealy, 24 W. R. 918 . . . . .	262
Manners v. Johnson, 1 Ch. D. 673; 45 L. J. Ch. 404; 24 W. R. 481. . . . .	101
Manning v. Fitzgerald, 29 L. J. Ex. 24; 1 F. & F. 633 . . . . .	229
— v. Lunn, 2 C. & K. 13 . . . . .	97
— v. Phelps, 10 Exch. 59; 24 L. J. Ex. 62 . . . . .	225
Mansergh v. Rimell, W. N. 1884, p. 34 . . . . .	258
Mantz v. Goring, 4 B. N. C. 451; 6 Scott, 277; 1 Arn. 198 . . . . .	82, 83
Margary v. Robinson, 12 P. D. 8; 56 L. J. Prob. 42; 57 L. T. 281; . . . . .	
35 W. R. 350; 51 J. P. 407 . . . . .	154

	PAGE
Markey v. Coots, 10 Ir. Rep. C. L. 149 . . . . .	43
Markwick v. Hardingham, 15 Ch. D. 339; 43 L. T. 617; 29 W. R. 361 . . . . .	209, 218, 224
Marsh v. Curteys, 2 Cro. Eliz. 528 . . . . .	108, 109
— v. Deves, 17 Jur. 558 . . . . .	275
Marshall v. Smith, 10 Jur. N. S. 1174; 34 L. J. Ch. 189; 11 L. T. 443; 13 W. R. 198 . . . . .	197
Marston v. Downes, 1 A. & E. 31; 3 N. & M. 861; 6 C. & P. 331 . . . . .	250, 251
Martin v. Gilham, 7 A. & E. 540; 2 N. & P. 568 . . . . .	94
— v. Smith, 27 L. J. Ex. 317 . . . . .	147
Martyn v. Clue, 18 Q. B. 661; 22 L. J. Q. B. 147 . . . . .	64, 86
— v. Podger, 5 Burr. 2631; 2 W. Bl. 701 . . . . .	147
— v. Williams, 1 H. & N. 817; 26 L. J. Ex. 117 . . . . .	62, 64
Mason v. Cole, 4 Exch. 375; 18 L. J. Ex. 478 . . . . .	101
— v. Farnell, 12 M. & W. 674; 13 L. J. Ex. 142; 1 D. & L. 576 . . . . .	30, 235
— v. Mason, 1 Mer. 308 . . . . .	242
— v. Paynter, 1 Q. B. 974; 1 G. & D. 381; 6 Jur. 214 . . . . .	266
Massey v. Goodall, 17 Q. B. 310; 20 L. J. Q. B. 526; 15 Jur. 991 . . . . .	103
Mathews v. Whetton, Cro. Car. 233 . . . . .	183
Matthew v. Osborne, 13 C. B. 919; 22 L. J. C. P. 241; 17 Jur. 696 . . . . .	187, 191
Maugham v. Hubbard, 8 B. & C. 14; 2 M. & Ry. 5 . . . . .	248
Maund v. Monmouth, Car. & Mar. 606; 4 M. & Gr. 452; 2 Dowl. N. S. 113; 5 Scott N. R. 457; 6 Jur. 932 . . . . .	19
Mannsell v. Hort, 1 L. R. Ir. 88 . . . . .	86, 92, 93
May v. May, 2 Str. 1073 . . . . .	236
Meath v. Cuthbert, Ir. Rep. 10 C. L. 395 . . . . .	85
— v. Winchester, 3 B. N. C. 183 . . . . .	243
Meek v. Carter, 4 Jur. N. S. 992; 6 W. R. 852 . . . . .	94, 116, 127
Mellers v. Devonshire, 16 Beav. 252; 22 L. J. Ch. 310; 1 W. R. 44 . . . . .	105
Melling v. Leak, 16 C. B. 652; 24 L. J. C. P. 187; 3 C. L. R. 1017; 1 Jur. N. S. 759 . . . . .	48, 216
Mellish v. Brook, 3 Beav. 22 . . . . .	225
Mellor v. Watkins, L. R. 9 Q. B. 400; 23 W. R. 55 . . . . .	46
Melwich v. Luter, 4 Co. Lit. 26 a; Cro. Eliz. 102 . . . . .	186, 188
Mendes v. Mendes, 1 Ves. Sen. 89; 3 Atk. 619 . . . . .	175
Merest v. Harvey, 5 Taunt. 442; 1 Marsh. 139; 15 R. R. 548 . . . . .	11
Metropolitan Assurance Soc. v. Brown, 28 L. J. Ex. 340 . . . . .	132
Metters v. Brown, 1 H. & C. 686; 32 L. J. Ex. 138; 7 L. T. 795; 11 W. R. 429; 9 Jur. N. S. 416 . . . . .	163, 223
Meux v. Cobley, [1892] 2 Ch. 253; 61 L. J. Ch. 449; 66 L. T. 86 . . . . .	104
Meyer v. Sefton, 2 Stark. 274 . . . . .	250
Middleton v. Power, 19 L. R. Ir. 1 . . . . .	112
Miles v. Murphy, Ir. Rep. 5 C. L. 382 . . . . .	40, 41
— v. Tobin, 17 L. T. 432; 16 W. R. 465 . . . . .	114
Milfax v. Baker, 1 Lev. 26 . . . . .	183

	PAGE
Mills, <i>Re</i> , 34 Ch. D. 186 ; 56 L. J. Ch. 118 ; 55 L. T. 665 ; 35 W. R. 138 . . . . .	158
— <i>v. Capel</i> , 20 Eq. 592 ; 44 L. J. Ch. 674 ; 83 L. T. 158 . . . . .	213
— <i>v. Goff</i> , 14 M. & W. 72 ; 14 L. J. Ex. 249 ; 2 D. & L. 23 . . . . .	38
— <i>v. Oddy</i> , 6 C. & P. 728 ; 1 Gale, 92 ; 3 Dowl. 722 ; 2 C. M. & R. 103 . . . . .	251
Milner <i>v. Maclean</i> , 2 C. & P. 17 . . . . .	14, 18
Minet <i>v. Johnson</i> , 63 L. T. 507 . . . . .	256
Minshull <i>v. Oakes</i> , 2 H. & N. 793 ; 27 L. J. Ex. 194 ; 4 Jur. N. S. 169 . . . . .	64
Minton <i>v. Geiger</i> , 28 L. T. 449 . . . . .	230
Mitchison <i>v. Thomson</i> , 1 C. & E. 72 . . . . .	126
Moase <i>v. White</i> , 3 Ch. D. 763 ; 24 W. R. 1038 . . . . .	158
Moisea <i>v. Thornton</i> , 8 T. R. 303 . . . . .	249
Molineux <i>v. Molineux</i> , Cro. Jac. 144 . . . . .	73
Mollett <i>v. Brayne</i> , 2 Camp. 103 ; 11 R. R. 676 . . . . .	50, 51
Monk <i>v. Butler</i> , 1 Roll. R. 83 . . . . .	179
— <i>Noyes</i> , 1 C. & P. 265 . . . . .	87
Monkton <i>r. A. G.</i> , 2 R. & My. 247 . . . . .	245, 246
Moons <i>v. De Bernales</i> , 1 Russ. 301 . . . . .	241
Moor <i>v. Denn</i> , 2 B. & P. 247 ; 7 Bro. P. C. 607 ; 3 T. R. 558 ; 6 <i>id.</i> 175 . . . . .	268
— <i>v. Raisbeck</i> , 12 Sim. 123 . . . . .	157
Moore <i>v. Clark</i> , 5 Taunt. 90 . . . . .	85
— <i>v. Plymouth</i> , 3 B. & Ald. 66 ; 1 Moore, 346 ; 7 Taunt. 614 . . . . .	60
— <i>v. Woolsey</i> , 4 E. & B. 243 ; 3 C. L. R. 207 ; 24 L. J. Q. B. 40 ; 1 Jur. N. S. 468 . . . . .	84
More's case, Cro. Eliz. 26 . . . . .	81
Morgan <i>v. Davies</i> , 3 C. P. D. 260 ; 26 W. R. 816 . . . . .	36, 39
— <i>v. Morgan</i> , 10 Eq. 99 ; 39 L. J. Ch. 498 ; 22 L. T. 595 ; 18 W. R. 744 . . . . .	215
— <i>v. Swansea</i> , 9 Ch. D. 582 ; 27 W. R. 283 . . . . .	169
— <i>v. Thomas</i> , 8 Exch. 302 ; 22 L. J. Ex. 152 ; 17 Jur. 283 . . . . .	163
Morrell <i>v. Frith</i> , 3 M. & W. 402 ; 8 C. & P. 246 ; 7 L. J. Ex. 172 ; 2 Jur. 619 ; 1 H. & H. 100 . . . . .	210
Morris <i>v. Davies</i> , 1 Cl. & F. 163 ; 1 Jur. 911 . . . . .	243, 244
— <i>v. Ogden</i> , L. R. 4 C. P. 687 ; 88 L. J. C. P. 329 ; 20 L. T. 978 ; 17 W. R. 1103 . . . . .	179
— <i>v. Smith</i> , 3 Doug. 279 . . . . .	105
Morrison <i>v. Chadwick</i> , 7 C. B. 266 ; 6 D. & L. 567 ; 18 L. J. C. P. 189 ; 13 Jur. 638 . . . . .	111
Mortimer <i>v. McCallan</i> , 6 M. & W. 58 ; 9 L. J. Ex. 73 ; 4 Jur. 633 . . . . .	250
Morton <i>v. Woods</i> , L. R. 3 Q. B. 658 ; 4 <i>id.</i> 293 ; 37 L. J. Q. B. 242 ; 38 <i>id.</i> 81 ; 9 B. & S. 632, 650 ; 16 W. R. 979 ; 17 <i>id.</i> 414 ; 18 L. T. 791 . . . . .	28, 132, 133
Moss <i>v. Gallimore</i> , 1 Sm. L. C. 604 (ed. 9) ; 1 Doug. 279 . . . . .	133, 134, 136
— <i>v. James</i> , 37 L. T. 715 ; 47 L. J. Q. B. 160 . . . . .	51

	PAGE
Mountnoy v. Collier, 1 E. & B. 630; 22 L. J. Q. B. 124; 17 Jur. 503	31, 229, 275
Moyle v. Mayle, Owen 66 . . . . .	93
Muggleton v. Barnett, 1 H. & N. 282; 2 <i>id.</i> 653; 26 L. J. Ex. 47;	
27 <i>id.</i> 125; 2 Jur. N. S. 1026; 4 <i>id.</i> 139; 6 W. R. 182 . . . . .	169, 188
Mulcarry v. Eyres, Cro. Car. 511 . . . . .	107
Mulckern v. Doerks, 53 L. J. Q. B. 526; 51 L. T. 429 . . . . .	261
Mumford v. Collier, 25 Q. B. D. 279; 38 W. R. 716; 59 L. J. Q. B.	
552 . . . . .	131
Municipal Soc. v. Smith, 22 Q. B. D. 70; 58 L. J. Q. B. 61; 37 W.	
R. 42. . . . .	135
Munn v. Godbold, 3 Bing. 292 . . . . .	250
Munro v. Munro, 7 Cl. & Fin. 842 . . . . .	168
Murphy v. Murphy, 15 Ir. C. L. R. 205; 31 L. J. Mat. 162 . . . . .	208
Murray v. Milner, 12 Ch. D. 845; 48 L. J. Ch. 775; 41 L. T. 213;	
27 W. R. 881 . . . . .	245
— v. Stair, 2 B. & C. 82; 3 D. & R. 278 . . . . .	250
Musgrave v. Stevens, W. N. 1881, p. 163 . . . . .	261
 NANSON v. Barnes, 7 Eq. 250; 20 L. T. 154; 17 W. R. 429 . . . . .	166
National Provincial Bank v. Jackson, 33 Ch. D. 1; 55 L. T. 458; 34	
W. R. 597. . . . .	249
Naylor v. Collinge, 1 Taunt. 19; 9 R. R. 691 . . . . .	87
Neal v. Wilding, 2 Str. 1151 . . . . .	246
Neale v. Ratcliff, 15 Q. B. 916; 20 L. J. Q. B. 130; 15 Jur. 166 . . . . .	86
Neate v. Pickard, 2 Notes of Cases, 406 . . . . .	156
Neave v. Moss, 1 Bing. 360; 8 Moore, 389 . . . . .	31
Nelson v. Hopkins, 21 L. J. Ch. 410. . . . .	158
Nepean v. Doe, 2 Sm. L. C. 610 (ed. 9); 2 M. & W. 694 . . . . .	194, 204, 205, 206
New British Co. v. Peed, 3 C. P. D. 196; 26 W. R. 354 . . . . .	264
Newbould v. Smith, 33 Ch. D. 127; 55 L. J. Ch. 788; 55 L. T. 194;	
34 W. R. 690 . . . . .	221
Newby v. Sharpe, 8 Ch. D. 39; 47 L. J. Ch. 617; 38 L. T. 583; 26	
W. R. 685. . . . .	234
Newcastle, <i>Re</i> , 8 Eq. 700; 39 L. J. Ch. 68; 21 L. T. 343; 18	
W. R. 8 . . . . .	145
Newitt, <i>Ex parte</i> , 16 Ch. D. 522; 44 L. T. 5; 29 W. R. 344 . . . . .	108, 112
Newton v. Smythies, 1 F. & F. 477; 3 H. & N. 840; 28 L. J.	
Ex. 97 . . . . .	103
Newton v. Chaplin, 10 C. B. 356; 19 L. J. C. P. 874 . . . . .	251
— v. Harland, 1 Scott, N. R. 474; 1 M. & Gr. 644; 2 Jur. 350	
	11, 13
— v. Nock, 43 L. T. 197 . . . . .	105
Nichols v. Hawkes, 10 Hare, 342 . . . . .	159
Niclosen v. Wordsworth, 2 Swanst. 365 . . . . .	161

	PAGE
Nicoll v. Fenning, 19 Ch. D. 258; 51 L. J. Ch. 166; 45 L. T. 738;	
80 W. R. 95	90
Nind v. Nineteenth Century, [1894] 1 Q. B. 472; [1894] 2 Q. B. 226;	
9 R. 220; 70 L. T. 831	122, 124
Nixon v. Freeman, 5 H. & N. 652; 29 L. J. Ex. 273; 6 Jur. N. S.	
983	235
Noel v. Robinson, 1 Vern. 90; 2 Vent. 358; 2 Ch. Cas. 145; 2 Ch.	
Rep. 128	235
Nokes v. Gibbon, 26 L. J. Ch. 433; 3 Drew. 681; 3 Jur. N. S. 726...	84, 127
North London Freehold Co. v. Jacques, W. N. 1883, p. 187; 49 L.	
T. 659; 32 W. R. 283; 48 J. P. 405	121, 124, 126
Norton v. L. & N. W. R., 13 Ch. D. 268; 47 L. J. Ch. 859; 41 L. T.	
28 W. R. 173; 44 J. P. 22	195
Norval v. Pascoe, 34 L. J. Ch. 82; 10 L. T. 809; 12 W. R. 973; 10	
Jur. N. S. 792	62
Nottingham v. Tomkinson, 4 C. P. D. 343; 48 L. J. M. C. 174; 23	
W. R. 151	244
 OAKAPPLE v. Copous, 4 T. R. 361	45
Oakley v. Monck, L. R. 1 Ex. 159; 3 H. & C. 706; 4 <i>id.</i> 251; 34	
L. J. Ex. 137; 35 <i>id.</i> 87; 14 L. T. 20; 12 <i>id.</i> 465; 14 W. R.	
406; 13 <i>id.</i> 721; 11 Jur. N. S. 376	134
Oastler v. Henderson, 2 Q. B. D. 575; 46 L. J. Q. B. 607; 37 L. T.	
22	51
Oates v. Brydon, 3 Burr. 1895	178
Owen v. de Beauvoir, 16 M. & W. 547; 5 Exch. 166; 11 Jur. 458;	
19 L. J. Ex. 177.	197, 198
— v. Williams, 32 L. J. P. M. & A. 159; 9 L. T. 86; 11 W. R.	
808	239
 PACK v. Tarpley, 9 A. & E. 468; 1 P. & D. 478; 2 W. W. & H. 88	237
Paddington Charities, <i>Re</i> , 8 Sim. 629; 7 L. J. Ch. 44; 2 Jur. 344	180,
	181
Paddock, v. Fradley, 1 C. & J. 90	230
Paine v. Edwards, 8 Jur. N. S. 1200	139
— v. Jones, 18 Eq. 320; 43 L. J. Ch. 787; 30 L. T. 779; 22 W. R.	
837	199
Palmer v. Earith, 14 M. & W. 428; 14 L. J. Ex. 256	96, 97
— v. Hendrie, 27 Beav. 349; 23 <i>id.</i> 341	138
— v. Palmer, 18 L. R. Ir. 192	241
Papendick v. Bridgwater, 5 E. & B. 166; 24 L. J. Q. B. 289; 1 Jur.	
N. S. 657; 3 W. R. 490	229
Papillon v. Brunton, 5 H. & N. 518; 29 L. J. Ex. 265; 2 L. T. 326	42,
	43
Paradine v. Jane, Aleyn, 26	234
Pargeter v. Harris, 7 Q. B. 708; 15 L. J. Q. B. 113; 10 Jur. 260	28



## TABLE AND INDEX OF CASES.

xlix

	PAGE
Parish v. Sleeman, 1 De G. F. & G. 326; 29 L. J. Ch. 53, 96; 1 L. T. 24, 506; 8 W. R. 166; 5 Jur. N. S. 1198; 6 <i>id.</i> 385	96, 97
Parker, <i>re</i> , 1 Sw. & Tr. 523	161
— v. Manning, 7 T. R. 537	27
— v. Webb, 3 Salk 5	64
Parkinson v. Francis, 15 Sim. 160	241
— v. Potter, 16 Q. B. D. 152; 55 L. J. Q. B. 153; 53 L. T. 818; 34 W. R. 215	98
Parmenter v. Webber, 8 Taunt. 593; 2 Moore 656	79
Parson v. Sexton, 4 C. B. 899; 16 L. J. C. P. 181; 11 Jur. 849; 2 C. & K. 266	84
Partington v. Woodcock, 6 A. & E. 690; 5 N. & M. 672; 1 H. & W. 262	134, 135
Partridge v. Bere, 5 B. & Ald. 604; 1 D. & R. 272	130
Paterson v. Mills, 19 L. J. Ch. 310; 15 Jur. 1	165
Paul v. Nurse, 8 B. & C. 486; 2 M. & Ry. 525	64, 65
Paull v. Simpson, 9 Q. B. 365; 15 L. J. Q. B. 382; 11 Jur. 13	232
Payne v. Burridge, 12 M. & W. 727; 13 L. J. Ex. 191	98, 99
— v. Haine, 16 M. & W. 541; 16 L. J. Ex. 130	82, 83
Paynter v. Carew, Kay, xxxvi. appendix	138
Peaceable v. Watson, 4 Taunt 16; 13 R. R. 552	26, 227, 229
Peachy v. Somerset, 1 Str. 447; 2 Wh. & Tud. L. C. 1245 (ed. 6)	184, 185, 186
Pearce v. Hooper, 3 Taunt. 60	248
Pearse v. Boulter, 2 F. & F. 133	43
Pearse v. Coaker, L. R. 4 Ex. 92; 38 L. J. Ex. 82; 20 L. T. 82, 191, 192	
Pearson v. Glazebrook, L. R. 3 Ex. 27; 37 L. J. Ex. 15; 17 L. T. 260	274
— v. A. G., 53 L. T. 707	242, 245
Pease v. Coats, 2 Eq. 688; 36 L. J. Ch. 57; 12 Jur. N. S. 684; 14 L. T. 886; 14 W. R. 1021	90
Pedder v. Hunt, 18 Q. B. D. 565; 56 L. J. Q. B. 212; 56 L. T. 687; 35 W. R. 371	202
Pedler v. Paige, 1 M. & Rob. 258	247
Pellatt v. Boosey, 31 L. J. C. P. 281; 8 Jur. N. S. 1107	108, 109, 110, 111, 233
Pelley v. Bascombe, 34 L. J. Ch. 233; 9 Jur. N. S. 1120; 11 <i>id.</i> 52; 13 W. R. 306; 4 Giff. 390	195, 196
Pembroke v. Berkeley, Cro. Eliz. 384	55
Pendleton v. Rooth, 1 De G. F. & J. 81; 1 Giff. 35; 29 L. J. Ch. 265; 5 Jur. N. S. 840; 6 <i>id.</i> 182; 8 W. R. 101	218
Pendrell v. Pendrell, 2 Str. 924	246
Pennant's case, 3 Co. Rep. 64a	107, 112
Penney v. Todd, 26 W. R. 502	196
Pennial v. Harborne, 11 Q. B. 368; 17 L. J. Q. B. 94; 12 Jur. 159	94, 95, 112, 114
Pennock v. Pennock, 13 Eq. 144; 41 L. J. Ch. 141; 25 L. T. 691; 20 W. R. 141	159
W.Y.E.	d

	PAGE
Penny v. Allen, 7 De G. M. & G. 409; 3 Jur. N. S. 273 . . . . .	213
Penry v. Brown, 2 Stark. 403 . . . . .	85, 87
Pentland v. Stokes, 2 Ball & B. 68 . . . . .	215
Perry v. Davis, 3 C. B. N. S. 769 . . . . .	112
Petre v. Petre, 1 Drew. 371; 15 Jur. 698 . . . . .	215, 216, 217
Phené, <i>re</i> , 5 Ch. 139; 39 L. J. Ch. 316; 22 L. T. 111; 18 W. R. 303 . . . . .	242
Phené v. Popplewell, 12 C. B. N. S. 334; 31 L. J. C. P. 235; 8 Jur. N. S. 1104; 6 L. T. 247; 10 W. R. 523 . . . . .	51
Philips v. Philips, 4 Q. B. D. 127; 48 L. J. Q. B. 135; 39 L. T. 556; 40 <i>id.</i> 815; 27 W. R. 436, 939 . . . . .	262, 265
Phillips v. Bridge, L. R. 9 C. P. 48; 43 L. J. C. P. 13; 29 L. T. 692; 22 W. R. 237 . . . . .	72, 73
— v. Hartley, 3 C. & P. 121 . . . . .	163
— v. Pearce, 5 B. & C. 433; 8 D. & R. 43 . . . . .	180
— v. Smith, 14 M. & W. 589; 15 L. J. Ex. 201 . . . . .	93
Phillipson v. Gibbon, 6 Ch. 428; 40 L. J. Ch. 406; 24 L. T. 602; 19 W. R. 661 . . . . .	194
Philpot v. Hoare, 2 Atk. 219 . . . . .	81
Phipps v. Sculthorpe, 1 B. & Ald. 50 . . . . .	27
Pickard v. Sears, 6 A. & E. 469; 2 N. & P. 488 . . . . .	112
Pilcher, <i>re</i> , 11 Ch. D. 905; 48 L. J. Ch. 587; 40 L. T. 832; 27 W. R. 789 . . . . .	261, 262
Pilton, <i>ex parte</i> , 1 B. & Ald. 369 . . . . .	283
Pinhorn v. Souster, 8 Exch. 763; 22 L. J. Ex. 18, 266 . . . . .	47, 48, 132
Pinney v. Pinney, 8 B. & C. 335 . . . . .	162
Pitt v. Dacre, 3 Ch. D. 295; 45 L. J. Ch. 796; 24 W. R. 943 . . . . .	225
Plant v. Taylor, 7 H. & N. 211; 31 L. J. Ex. 289; 5 L. T. 318; 8 Jur. N. S. 140 . . . . .	4
Playfair v. Musgrove, 14 M. & W. 239; 15 L. J. Ex. 26; 3 D. & L. 72; 9 Jur. 783 . . . . .	147
Pleasant v. Benson, 14 East 234; 12 R. R. 507 . . . . .	41
Plowes v. Bossey, 31 L. J. Ch. 681; 10 W. R. 332; 2 Drew & Sm. 143; 8 Jur. N. S. 352 . . . . .	243, 244
Pocock v. Faulks, 10 Times Rep. 183 . . . . .	19
— v. Gilham, 1 C. & E. 104 . . . . .	101
Polkinhorn v. Wright, 8 Q. B. 197; 15 L. J. Q. B. 70; 10 Jur. 11 . . . . .	17
Pollen v. Brewer, 7 C. B. N. S. 371; 6 Jur. N. S. 509 . . . . .	11, 13, 47
Pollock v. Stacy, 9 Q. B. 1033; 16 L. J. Q. B. 132; 11 Jur. 267 . . . . .	79
Poole v. Warren, 8 A. & E. 532; 3 N. & P. 693; 3 Jur. 23 . . . . .	248, 250
— v. Whitt, 15 M. & W. 571; 16 L. J. Ex. 229 . . . . .	32, 234
Pope, <i>re</i> , 17 Q. B. D. 743 . . . . .	149
— v. Biggs, 9 B. & C. 245; 4 M. & Ry. 198 . . . . .	136
Portman v. Home Hospital Ass., 27 Ch. D. 81 note; 50 L. T. 599 . . . . .	89
Postmaster General, <i>ex parte</i> , 10 Ch. D. 595; 48 L. J. Bank. 84; 40 L. T. 16; 27 W. R. 325 . . . . .	172
Poultney v. Holmes, 1 Str. 405 . . . . .	79
Powel v. Cleanor, 2 Bro. C. C. 500 . . . . .	175

# TABLE AND INDEX OF CASES.

li

	PAGE
Powel v. Milbank, 3 Wils. 355; 2 W. Bl. 851 . . . . .	179, 238
Powley v. Walker, 5 T. R. 373; 2 R. R. 619 . . . . .	94
Pownall v. Moores, 5 B. & Ald. 416 . . . . .	103
Powsely v. Blackman, Cro. Jac. 659 . . . . .	131
Praed v. Hull, 1 Sim. & S. 331 . . . . .	139, 142
Pratt v. Swaine, 8 B. & C. 285; 2 M. & Ry. 350 . . . . .	163, 200
Preece v. Corrie, 5 Bing. 24; 2 M. & P. 57 . . . . .	79
Prescott v. Barker, 9 Ch. 174; 43 L. J. Ch. 498; 29 L. T. 727; 30	
<i>id.</i> 149; 22 W. R. 423 . . . . .	158
Price, <i>re</i> , 28 Ch. D. 709; 54 L. J. Ch. 509; 52 L. T. 430 . . . . .	154
— v. Varney, 3 B. & C. 733; 5 D. & R. 612 . . . . .	148
— v. Worwood, 4 H. & N. 512; 23 L. J. Ex. 329; 5 Jur. N. S.	
472 . . . . .	94, 108, 109, 113, 231, 232
Prince v. Blackburn, 2 East 250 . . . . .	247
— v. Evans, 29 L. T. 835 . . . . .	44
Proudfoot v. Hart, 25 Q. B. D. 42; 59 L. J. Q. B. 389; 38 W. R.	
730 . . . . .	82, 83
Prudential Assurance v. Edmonds, 2 App. Cas. 487 . . . . .	242
Pugh v. Arton, 8 Eq. 626; 33 L. J. Ch. 619; 20 L. T. 865 . . . . .	56, 68
— v. Heath, 6 Q. B. D. 345; 7 App. Cas. 235; 50 L. J. Q. B.	
473; 51 <i>id.</i> 387; 44 L. T. 327; 46 <i>id.</i> 321; 29 W. R. 904;	
30 <i>id.</i> 553 . . . . .	197, 217
QUARRINGTON v. Arthur, 10 M. & W. 385; 11 <i>id.</i> 491; 2 Dowl. N.	
S. 1036; 12 L. J. Ex. 311 . . . . .	105
Quartermaine v. Selby, 5 Times Rep. 223 . . . . .	35, 43
Quilter v. Mapleson, 9 Q. B. D. 672; 52 L. J. Q. B. 44; 31 W. R.	
75 . . . . .	125
R. v. Allison, R. & R. 109 . . . . .	241
— v. All Saints, Derby, 13 East 143 . . . . .	180
— v. Atkins, 3 Burr. 1706 . . . . .	14, 17
— v. Aylesbury, 9 Q. B. 261 . . . . .	97
— v. Bathurst, Sayer 225 . . . . .	17
— v. Birmingham, 1 B. & S. 763; 31 L. J. M. C. 63; 5 L. T. 309;	
10 W. R. 41; 8 Jur. N. S. 37 . . . . .	229
— v. Blake, 3 Burr. 1731 . . . . .	13, 14, 17, 18
— v. Bliss, 7 A. & E. 550; 2 N. & P. 464 . . . . .	229
— v. Bolton, 1 Q. B. 66; 4 P. & D. 679; 5 Jur. 1154 . . . . .	182
— v. Bowser, 8 Dowl. 128 . . . . .	23
— v. Bramley, 6 T. R. 330 . . . . .	245
— v. Child, 2 Cox C. C. 102 . . . . .	17
— v. Darlington, 6 Q. B. 682; 14 L. J. Q. B. 67; 9 Jur. 21 . . . . .	236
— v. Dillon, 2 Chit. 314 . . . . .	21
— v. Dorney, 12 Mod. 418; 1 Salk. 260 . . . . .	24
— v. Elwell, 2 Ld. Ray 1514; 2 Str. 794 . . . . .	20

	PAGE
R. v. Ely, 8 B. & C. 112 . . . . .	238
— v. Eriswell, 3 T. R. 707 . . . . .	237
— v. Exeter, L. R. 4 Q. B. 341; 38 L. J. M. C. 126; 20 L. T. 693; 17 W. R. 850 . . . . .	229
— v. Garland, L. R. 5 Q. B. 269; 39 L. J. Q. B. 86; 22 L. T. 160; 18 W. R. 429 . . . . .	152
— v. Griffith, 3 Salk 169 . . . . .	17
— v. Hake, 4 M. & Ry. 483 . . . . .	21
— v. Harland, 8 A. & E. 826; 1 P. & D. 93; 2 M. & Rob. 141 . . . . .	17, 21, 23
— v. Harris, 1 Salk. 260 . . . . .	23
— v. Haslingfield, 2 M. & S. 558; 15 R. R. 350 . . . . .	252
— v. Haworth, 4 C. & P. 254 . . . . .	251
— v. Hoare, 6 M. & S. 266 . . . . .	17
— v. Hord, Sayer 173 . . . . .	20
— v. Jones, 1 Str. 474 . . . . .	24
— v. Layton, 1 Salk. 353 . . . . .	20, 21
— v. Llanfaethly, 2 E. & B. 940; 17 Jur. 1123 . . . . .	251
— v. Luffe, 8 East, 193; 9 R. R. 406 . . . . .	244
— v. Mansfield, 1 Q. B. 444; 1 G. & D. 7; 5 Jur. 505 . . . . .	244
— v. Middlesex JJ., 7 Dowl. 767 . . . . .	182
— v. Mildmay, 5 B. & Ad. 254; 2 N. & M. 778 . . . . .	187
— v. North Petherton, 5 B. & C. 508 . . . . .	243
— v. Oakley, 4 B. & Ad. 307; 1 N. & M. 58 . . . . .	16, 19, 20, 23
— v. Rishworth, 2 Q. B. 476 . . . . .	245
— v. St. Giles, 22 L. J. M. C. 54 . . . . .	248
— v. St. Martins, 2 A. & E. 210 . . . . .	248
— v. Paul's, 7 Q. B. 232 . . . . .	249
— v. Sewell, 8 Q. B. 161; 15 L. J. Q. B. 49; 10 Jur. 48. . . . .	235
— v. Smyth, 1 M. & Rob. 155; 5 C. & P. 201 . . . . .	14
— v. Sourton, 5 A. & E. 180; 6 N. & M. 575 . . . . .	244
— v. Storr, 3 Burr. 1698 . . . . .	14, 17
— v. Toddington, 1 B. & Ald. 560 . . . . .	176
— v. Tolson, 4 F. & F. 103 . . . . .	242
— v. Topping, Mc. & Y. 544 . . . . .	55
— v. Traill, 12 A. & E. 761; 4 P. & D. 325 . . . . .	285
— v. Wannop, Sayer, 142 . . . . .	17
— v. Watson, 2 Stark, 130 . . . . .	250
— v. Weaver, L. R. 2 C. C. R. 85; 43 L. J. M. C. 13; 29 L. T. 544; 22 W. R. 190; 12 Cox, C. C. 527 . . . . .	243
— v. Wilby, 2 M. & S. 504; 15 R. R. 328 . . . . .	175
— v. Williams, 9 B. & C. 549; 4 M. & Ry. 471 . . . . .	24
— v. Wilson, 8 T. R. 357; 4 R. R. 694 . . . . .	13, 14, 17, 18
— v. Wilson, 10 B. & C. 80 . . . . .	187
— v. Wilson, 3 A. & E. 817; 5 N. & M. 164 . . . . .	16, 20, 23, 24
— v. Winter, 2 Salk. 587 . . . . .	23, 24
Rafferty v. King, 1 Keen, 601; 6 L. J. Ch. 87 . . . . .	218, 219
Rains v. Burton, 14 Ch. D. 537; 49 L. J. Ch. 473; 43 L. T. 88; 28 W. R. 954 . . . . .	198, 217

## TABLE AND INDEX OF CASES.

liii

	PAGE
Rakestraw <i>v.</i> Bruyer, Moseley, 189 . . . . .	220
Ramsbottom <i>v.</i> Buckhurst, 2 M. & S. 565; 15 R. R. 352 . . . . .	146, 236
Randall <i>v.</i> Stevens, 2 E. & B. 641; 23 L. J. Q. B. 68; 1 C. L. R. 641; 18 Jur. 128 . . . . .	204, 207
Randle <i>v.</i> Lory, 6 A. & E. 218 . . . . .	104, 106
Rastal <i>v.</i> Turner, Cro. Eliz. 598 . . . . .	185
Rawlins <i>v.</i> Briggs, 3 C. P. D. 368; 47 L. J. C. P. 487; 27 W. R. 138 . . . . .	99
Rawson <i>v.</i> Eicke, 7 A. & E. 451; 2 N. & P. 423 . . . . .	133
Rayson <i>v.</i> Adcock, 7 L. T. 747; 9 Jur. N. S. 800 . . . . .	187, 188
Read <i>v.</i> Wotton, (1893) 2 Ch. 171; 62 L. J. Ch. 481; 68 L. T. 209; 41 W. R. 556; 3 R. 374 . . . . .	262
Reading's Case, 1 Salk. 392 . . . . .	173
Rearden <i>v.</i> Minter, 5 M. & Gr. 204 . . . . .	248
Reay <i>v.</i> Rawlinson, 29 Beav. 88; 30 L. J. Ch. 330; 7 Jur. N. S. 118 159	
Rede <i>v.</i> Farr, 6 M. & S. 121 . . . . .	59, 107, 108
Roes <i>v.</i> King, Forrest 19 . . . . .	223
— <i>v.</i> Davies, 4 C. B. N. S. 56 . . . . .	282
— <i>v.</i> Perrott, 4 C. & P. 230 . . . . .	26, 42
Reeves <i>v.</i> Cattell, 24 W. R. 485 . . . . .	89
Reilly <i>v.</i> Fitzgerald, 6 Ir. Eq. Rep. 335 . . . . .	241
Bennie <i>v.</i> Robinson, 1 Bing. 147; 7 Moore, 539 . . . . .	28, 30
Reynolds <i>v.</i> Pitt, 19 Ves. 134 . . . . .	127
— <i>v.</i> Reynolds, 12 Ir. Eq. Rep. 172 . . . . .	227
— <i>v.</i> Wright, 25 Beav. 100; 27 L. J. Ch. 392 . . . . .	152, 153
Rhodes <i>v.</i> Rhodes, 36 Ch. D. 586; 56 L. J. Ch. 325; 57 L. T. 652 . . . . .	242
— <i>v.</i> Smethurst, 4 M. & W. 42; 6 <i>id.</i> 351; 2 Jur. 893; 4 <i>id.</i> 702 . . . . .	210
Richards <i>v.</i> Bluck, 6 C. B. 437; 6 D. & L. 325 . . . . .	103
— <i>v.</i> Richards, 15 East, 294 n.; 13 R. R. 475 . . . . .	168, 241
Richardson <i>v.</i> Webb, 1 M. B. R. 40 . . . . .	146
— <i>v.</i> Younge, 6 Ch. 478; 40 L. J. Ch. 338; 25 L. T. 230; 19 W. R. 612 . . . . .	218, 219
Rider, <i>v.</i> Wood, 1 K. & J. 644; 24 L. J. Ch. 737 . . . . .	168, 169
Right <i>v.</i> Bucknell, 2 B. & Ad. 278 . . . . .	33, 136
— <i>v.</i> Cuthell, 5 East, 491; 5 Esp. 149; 7 R. R. 752 . . . . .	40, 44, 236
— <i>v.</i> Darby, 1 T. R. 159; 1 R. R. 169 . . . . .	36, 46
Bimington <i>v.</i> Cannon, 12 C. B. 18 . . . . .	194, 198
Rishton <i>v.</i> Nesbitt, 2 M. & Rob. 554 . . . . .	245
Roberts <i>v.</i> Brett, 11 H. L. C. 337; 34 L. J. C. P. 241; 13 W. R. 587; 11 Jur. N. S. 377 . . . . .	84
— <i>v.</i> Davey, 4 B. & Ad. 664; 1 N. & M. 443 . . . . .	60, 67, 68, 108
— <i>v.</i> Doxon, 1 Peake 83; 3 R. R. 660 . . . . .	250
— <i>v.</i> Gordon, 6 Ch. D. 531; 46 L. J. Ch. 794; 37 L. T. 627 . . . . .	161
— <i>v.</i> Oppenheim, 26 Ch. D. 724; 53 L. J. Ch. 1148; 50 L. T. 729; 32 W. R. 654 . . . . .	264
— <i>v.</i> Tayler, 1 C. B. 117; 3 D. & L. 1; 14 L. J. C. P. 87; 9 Jur. 330 . . . . .	11

	PAGE
Roe v. Charnock, 1 Peake 4; 3 R. R. 648 . . . . .	87
— v. Davis, 7 East 363 . . . . .	73, 236, 250
— v. Dawson, 3 Wils. 49 . . . . .	177
— v. Doe, 6 Bing. 574 . . . . .	39
— v. Galliers, 2 T. R. 133; 1 R. R. 445 . . . . .	55, 65, 100
— v. Harrison, 2 T. R. 425; 1 R. R. 513 . . . . .	66, 81, 113, 114
— v. Hicks, 2 Wils. 13; 1 Ld. Ken. 110 . . . . .	185, 187
— v. Hodgson, 2 Wils. 129 . . . . .	175
— v. Jones, 1 H. Bl. 30; 3 T. R. 88; 1 R. R. 656 . . . . .	153
— v. Lonsdale, 12 East 39 . . . . .	177
— v. Loveless, 2 B. & Ald. 453 . . . . .	187
— v. Minshall, B. N. P. 96 c. . . . .	110
— v. Paine, 2 Camp. 520 . . . . .	87, 110
— v. Parker, 5 T. R. 26 . . . . .	188, 237
— v. Pierce, 2 Camp. 96; 11 R. R. 673 . . . . .	236
— v. Ramsbotham, 3 M. & S. 516 . . . . .	31
— v. Rawlings, 7 East, 279 . . . . .	243
— v. Rowliston, 2 Taunt. 441; 11 R. R. 640 . . . . .	208
— v. Sales, 1 M. & S. 297 . . . . .	80
— v. Street, 2 A. & E. 329; 4 N. & M. 42 . . . . .	26, 47
— v. Wegg, 6 T. R. 708 . . . . .	184
— v. Wiggs, 2 B. & P. N. R. 330 . . . . .	189
Rogers v. Goodenough, 2 Sw. & T. 342; 31 L. J. Prob. 49; 5 L. T. 719; 8 Jur. N. S. 391 . . . . .	156
— v. Grazebrook, 8 Q. B. 395 . . . . .	131
— v. Hull Docks, 34 L. J. Ch. 165; 11 L. T. 42; 12 W. R. 1101; 10 Jur. N. S. 1245 . . . . .	36
— v. Humphreys, 4 A. & E. 299; 5 N. & M. 511 . . . . .	133, 134
— v. Pitcher, 6 Taunt. 202; 1 Marsh 541 . . . . .	26, 30, 146, 148
— v. Rice, (1892) 2 Ch. 170; 61 L. J. Ch. 573; 66 L. T. 640; 40 W. R. 489 . . . . .	123
Rolfe v. Peterson, 2 Bro. P. C. 436 . . . . .	104
Rolls v. Miller, 25 Ch. D. 206; 27 <i>id.</i> 71; 53 L. J. Ch. 682; 50 L. T. 597; 32 W. R. 806 . . . . .	89
Romily v. Fycroft, 4 W. R. 26 . . . . .	233
Rose v. Bartlett, Cro. Car. 292 . . . . .	158
Ross v. Clifton, 11 A. & E. 631; 9 Dowl. 1033; 5 Jur. 1059 . . . . .	19
Runcorn v. Cooper, 5 B. & C. 696; 8 D. & R. 450 . . . . .	222
Russell v. Baber, 18 W. R. 1021 . . . . .	102
— <i>Re</i> , 15 P. D. 111; 59 L. J. Prob. 80; 62 L. T. 644 . . . . .	155
Ruttledge v. Whelan, 10 L. R. Ir. 263 . . . . .	125
Ryan v. Clark, 14 Q. B. 65; 7 D. & L. 8 . . . . .	128
— v. Ring, 25 L. R. Ir. 184 . . . . .	243
SADLERS Cq.'s Case, 4 Co. Rep. 55 a. . . . .	8
St. Albans v. Battersby, 3 Q. B. D. 359; 47 L. J. Q. B. 571; 38 L. T. 685; 26 W. R. 678 . . . . .	90

TABLE AND INDEX OF CASES.

lv

	PAGE
St. George's v. St. Margaret's, 1 Salk. 123 . . . . .	244
Salisbury's Case, 1 Levinz, 63 . . . . .	184
Salmon v. Smith, 1 Wms. Saund 202 . . . . .	233
Salter v. Cavanagh, 2 Dru. & War. 668 . . . . .	215, 216
— v. Edgar, 54 L. T. 374 . . . . .	261
Sampson v. Easterby, 9 B. & C. 505; 4 M. & Ry. 422; 6 Bing. 644; 4 M. & P. 601; 1 C. & J. 105 . . . . .	65
Sanders v. Sanders, 19 Ch. D. 373; 50 L. J. Ch. 367; 51 <i>id.</i> 276; 44 L. T. 171; 45 <i>id.</i> 637; 29 W. R. 413; 30 <i>id.</i> 281, 208, 209, 218, 224 . . . . .	127
— v. Pope, 12 Ves. 282 . . . . .	127
Sandford v. Clarke, 21 Q. 18 D. 398; 57 L. J. Q. B. 507; 59 L. T. 226; 37 W. R. 28; 52 J. P. 773 . . . . .	37
Sandilands, <i>re</i> , L. R. 6 C. P. 411 . . . . .	249
Sandill v. Franklin, L. R. 10 C. P. 377; 44 L. J. C. P. 216; 32 L. T. 309; 23 W. R. 473 . . . . .	38
Sands to Thompson, 22 Ch. D. 614; 52 L. J. Ch. 406; 48 L. T. 210; 31 W. R. 397 . . . . .	140, 205, 215, 216
Saner v. Bilton, 7 Ch. D. 815; 47 L. J. Ch. 267; 38 L. T. 281; 26 W. R. 394 . . . . .	82, 83, 85, 93
Sangster v. Noy, 16 L. T. 157 . . . . .	43
Saunders' Case, 5 Co. Rep. 12 b. . . . .	162
Saunders v. Merryweather, 8 H. & C. 902; 35 L. J. Ex. 115; 13 W. R. 814 . . . . .	28
Savage v. Dent, 2 Str. 1064 . . . . .	235
Saverne v. Smith, Cro. Car. 7, 2 Rolle 344 . . . . .	185
Saye v. Sele's Case, 1 H. L. C. 507 . . . . .	244
Sayer v. Glossop, 2 Exch. 409 . . . . .	242
Scales v. Lawrence, 2 F. & F. 239 . . . . .	82, 83
Scallock v. Harston, 1 C. P. D. 106; 45 L. J. Q. B. 125; 34 L. T. 130 . . . . .	63, 64
Schoole v. Sall, 1 Sch. & L. 176 . . . . .	138
Scot v. Scot, Cro. Eliz. 73 . . . . .	74
Scott v. Brown, 51 L. T. 746 . . . . .	10, 121, 123
— v. Nixon, 3 Dru. & War. 388; 6 Ir. Eq. Rep. 8, 2 Con. & L. 185 . . . . .	224
— v. Scott, 4 H. L. C. 1065 . . . . .	214
Sear v. House Co., 16 Ch. D. 387; 50 L. J. Ch. 77; 43 L. T. 531; 29 W. R. 192; 45 J. P. 204 . . . . .	55, 78
Searby v. Tottenham R. C., 5 Eq. 409 . . . . .	195
Seddon v. Smith, 36 L. T. 168. . . . .	196
Seers v. Hind, 1 Ves. 294 . . . . .	81
Selby v. Browne, 7 Q. B. 620 . . . . .	69
Selwyn v. Garfit, 38 Ch. D. 273; 57 L. J. Ch. 609; 59 L. T. 233; 36 W. R. 513 . . . . .	112
— v. Selwyn, 2 Burr. 1131 . . . . .	153
Shaw v. Coffin, 14 C. B. N. S. 372 . . . . .	55
— v. Gould, L. R. 3 H. L. 55; 37 L. J. Ch. 438; 18 L. T. 833 . . . . .	168

	PAGE
Shaw v. Keighron, 3 Ir. Rep. Eq. 574 . . . . .	207
Shedden v. A. G., 2 S. & T. 170; 30 L. J. P. & M. 217; 3 L. T. 592; 6 Jur. N. S. 1163; 9 W. R. 285 . . . . .	242, 246
Shepherd v. Berger, (1891) 1 Q. B. 597; 60 L. J. Q. B. 395; 64 L. T. 435; 39 W. R. 330; 55 J. P. 532 . . . . .	57, 113
Sheppard v. Hong Kong Bank, 20 W. R. 459 . . . . .	78
Sherwood v. Clark, 15 M. v. W. 764. . . . .	145, 147
Shields v. Boucher, 1 De G. & S. 40 . . . . .	241, 245
Short v. King, 2 Str. 680. . . . .	267
Shrewsbury Peerage, 7 H. L. C. 1 . . . . .	245
— v. Gould, 2 B. & Ald. 487. . . . .	106
Simmons v. Norton, 7 Bing. 640; 5 M. & P. 645 . . . . .	93*
Simonds v. Lawnd, Cro. Eliz. 239 . . . . .	10
Simons v. Farren, 1 B. N. C. 126 . . . . .	90
Simpson v. Titterell, Cro. Eliz. 242 . . . . .	55
Skinner v. Stacey, 1 Wils. 80 . . . . .	140
Skinnners Co. v. Knight, (1891) 2 Q. B. 542; 60 L. J. Q. B. 629; 63 L. T. 698; 65 L. T. 240; 40 W. R. 57 . . . . .	121, 128
Skull v. Glenister, 33 L. J. C. P. 185; 12 W. R. 554; 9 L. T. 763; 16 C. B. N. S. 81 . . . . .	230
Slaney v. Wade, 1 My. & C. 338; 7 Sim. 595 . . . . .	246
Slater v. Stone, Cro. Jac. 645 . . . . .	86
Slatterie v. Pooley, 6 M. & W. 664; 10 L. J. Ex. 8; 4 Jur. 1038 . . . . .	26
Slipper v. Tottenham Ky. Co., 4 Eq. 112; 36 L. J. Ch. 341; 16 L. T. 446; 15 W. R. 861 . . . . .	81
Sly v. Sly, 2 P. D. 91; 46 L. J. Prob. 63; 25 W. R. 463. . . . .	229, 238
Smallpiece v. Evans, 1 Anders. 123 . . . . .	81
Smartle v. Williams, 1 Salk. 245 . . . . .	130
Smith v. Adkins, 8 M. & W. 362; 1 Dowl. N. S. 129 . . . . .	180
— v. Bennett, 30 L. T. 100. . . . .	195
— v. Birmingham Gas Co. 1 A. & E. 526; 3 N. & M. 771 . . . . .	236
— v. Bustard, 1 Leon. 141 . . . . .	74
— v. Day, 2 M. & W. 684; M. & H. 185 . . . . .	129
— v. Eggington, L. R. 9 C. P. 145; 43 L. J. C. P. 140; 30 L. T. 521 . . . . .	61, 134
— v. Gronow, (1891) 2 Q. B. 394; 60 L. J. Q. B. 776; 65 L. T. 117; 40 W. R. 46 . . . . .	67, 100, 101
— v. Humble, 15 C. B. 321. . . . .	98
— v. Lloyd, 9 Exch. 562; 23 L. J. Ex. 194; 2 C. L. R. 1007 . . . . .	194, 196
— and Nelson, re, 25 Q. B. D. 545; 59 L. J. Q. B. 533; 63 L. T. 475; 39 W. R. 117. . . . .	7
— v. Raleigh, 3 Camp. 513; 14 R. R. 829 . . . . .	233
— v. Robinson, (1893) 2 Q. B. 53; 62 L. J. Q. B. 509; 69 L. T. 434; 41 W. R. 588; 5 R. 469. . . . .	99
— v. Stocks, 10 B. & S. 701; 38 L. J. Q. B. 306; 20 L. T. 740; 17 W. R. 1135. . . . .	195



## TABLE AND INDEX OF CASES.

lvii

	PAGE
Smith <i>v.</i> Tebbitt, L. R. 1 P. & D. 354; 36 L. J. Prob. 97; 16 L. T. 841; 16 W. R. 18 . . . . .	245, 246
— <i>v.</i> Tett, 9 Exch. 307; 23 L. J. Ex. 93; 2 C. L. R. 509 . . . . .	191
— <i>v.</i> Walton, 8 Bing. 235; 1 M. & Sc. 380 . . . . .	40
— <i>v.</i> Whichcord, 24 W. R. 900 . . . . .	144
— <i>v.</i> Widlake, 3 C. P. D. 10; 47 L. J. Q. B. 282; 26 W. R. 52 . . . . .	31
Suigge <i>v.</i> Shirton, Cro. Jac. 199 . . . . .	16
Snow <i>v.</i> Cutler, 1 Keb. 567 . . . . .	237
— <i>v.</i> Phillips, 1 Sid. 220 . . . . .	238
— <i>v.</i> Whitehead, 27 Ch. D. 588; 53 L. J. Ch. 885; 51 L. T. 253; 33 W. R. 128 . . . . .	102
Sottomayer <i>v.</i> De Barros, 3 P. D. 1; 47 L. J. Prob. 28; 37 L. T. 415; 26 W. R. 455 . . . . .	247
Soulsby <i>v.</i> Neving, 9 East, 310; 9 R. R. 567 . . . . .	46
Soutchcot <i>v.</i> Stowell, 1 Mod. 226; 2 <i>id.</i> 207 . . . . .	166
South, <i>re</i> , 9 Ch. 369; 43 L. J. Ch. 441; 30 L. T. 347; 22 W. R. 388, 460 . . . . .	145
Southall <i>v.</i> Leadbetter, 3 T. R. 458 . . . . .	99
Soward <i>v.</i> Leggatt, 7 C. & P. 613 . . . . .	83
Spanish Telegraph Co. <i>v.</i> Shepherd, 13 Q. B. D. 202; 53 L. J. Q. B. 420; 51 L. T. 124; 32 W. R. 717 . . . . .	100
Sparrow <i>v.</i> Hawkes, 2 Esp. 505 . . . . .	46
Spencer's Case, 5 Co. Rep. 16 a. . . . .	64
Spooner <i>v.</i> Payne, 4 C. B. 328; 16 L. J. C. P. 225 . . . . .	247
Spotswood <i>v.</i> Barrow, 5 Exch. 110; 19 L. J. Ex. 226 . . . . .	10
Springett <i>v.</i> Jennings, 10 Eq. 488; 6 Ch. 333; 39 L. J. Ch. 652; 40 <i>id.</i> 348; 23 L. T. 132; 24 <i>id.</i> 643; 18 W. R. 962; 19 <i>id.</i> 575 . . . . .	157
Stackpoole <i>v.</i> Parkinson, Ir. Rep. 8 C. L. 561 . . . . .	40
Standen <i>v.</i> Christmas, 10 Q. B. 137; 16 L. J. Q. B. 265; 11 Jur. 694 . . . . .	61
Stanley <i>v.</i> Towgood, 3 B. N. C. 4; 3 Scott, 313 . . . . .	82, 84
Stansfield <i>v.</i> Hobson, 3 De G. M. & G. 620; 22 L. J. Ch. 657; 16 Beav. 236 . . . . .	218
Stanynought <i>v.</i> Cosins, Barnes, 456 . . . . .	192
Stapylton <i>v.</i> Clough, 2 E. & B. 933; 23 L. J. Q. B. 5; 18 Jur. 60 . . . . .	230
Stephenson <i>v.</i> Raine, 2 E. & B. 744; 23 L. J. Q. B. 62; 18 Jur. 176 268	
Stevens <i>v.</i> Copp, L. R. 4 Ex. 20; 38 L. J. Ex. 31; 19 L. T. 454; 17 W. R. 166 . . . . .	56, 64, 66, 106
Stevenson <i>v.</i> Lambard, 2 East, 575; 6 R. R. 511 . . . . .	64
— <i>v.</i> Liverpool, L. R. 10 Q. B. 81 . . . . .	162
Still <i>v.</i> Halford, 4 Camp. 17 . . . . .	251
Stolworthy <i>v.</i> Powell, 55 L. J. Q. B. 228; 54 L. T. 795 . . . . .	269
Strickland <i>v.</i> Strickland, 10 Sim. 374 . . . . .	165
Stringer, <i>re</i> , 6 Ch. D. 1; 46 L. J. Ch. 633; 37 L. T. 233; 25 W. R. 815 . . . . .	199
Strong <i>v.</i> Stringer, 61 L. T. 470 . . . . .	109
Stuart <i>v.</i> Diplock, 43 Ch. D. 343; 59 L. J. Ch. 142; 62 L. T. 333; 38 W. R. 223 . . . . .	90, 92
Stukeley <i>v.</i> Butler, Hob. 168 . . . . .	79

	PAGE
<i>Sturgeon v. Wingfield</i> , 15 M. & W. 224; 15 L. J. Ex. 212 . . .	33
<i>Sturgis v. Morse</i> , 24 Beav. 541; 3 De G. & J. 1; 2 De G. F. & J. 223; 29 L. J. Ch. 766; 8 W. R. 737; 6 Jur. N. S. 766 . . .	217
<i>Sugden v. St. Leonards</i> , 1 P. D. 154; 45 L. J. Prob. 49; 34 L. T. 372; 24 W. R. 860 . . .	239
<i>Sutcliffe v. James</i> , 40 L. T. 875 . . .	263
— <i>v. Rawlings</i> , 3 Exch. 407; 6 D. & L. 673 . . .	139, 141, 142
— <i>v. Wood</i> , 53 L. J. Ch. 970; 50 L. T. 705 . . .	261
<i>Swain v. Ayres</i> , 21 Q. B. D. 289; 57 L. J. Q. B. 428; 36 W. R. 798 2, 63, 120, 121, 123, 124 . . .	232
<i>Swann v. Falmouth</i> , 8 B. & C. 456; 2 M. & Ry. 534 . . .	42
<i>Sweeney v. Sweeney</i> , 10 Ir. Rep. C. L. 375 . . .	99
<i>Sweet v. Seagar</i> , 2 C. B. N. S. 119; 3 Jur. N. S. 588 . . .	74, 88
<i>Swetman v. Cush</i> , Cro. Jac. 8; Moore, 680 . . .	156
<i>Sykes, re</i> , L. R. 3 P. & D. 26; 42 L. J. Prob. 17; 28 L. T. 142; 21 W. R. 416 . . .	269
<i>Symons v. Rees</i> , 1 Ex. D. 416; 25 W. R. 116 . . .	
<i>TALBOT v. Hodson</i> , 7 Taunt. 251; 2 Marsh. 527 . . .	247
<i>Talbot de Malahide v. Odium</i> , Ir. Rep. 5 C. L. 302 . . .	49
<i>Tanham v. Nicholson</i> , L. R. 5 H. L. 561; Ir. Rep. 6 C. L. 188 . . .	42, 43
<i>Tatem v. Chaplin</i> , 2 H. Bl. 133; 3 R. R. 360 . . .	65
<i>Taunton v. Costar</i> , 7 T. R. 431; 4 R. R. 481 . . .	9, 11, 12
<i>Tawell v. Slate Co.</i> , 3 Ch. D. 629 . . .	261
<i>Taylor v. Wildin</i> , L. R. 3 Ex. 303; 37 L. J. Ex. 173; 18 L. T. 655; 16 W. R. 1018 . . .	45
<i>Taylor v. Cole</i> , 3 T. R. 292; 1 H. Bl. 561; 1 R. R. 706 . . .	9, 16, 146, 148
— <i>v. Meads</i> , 34 L. J. Ch. 203; 13 W. R. 394; 11 Jur. N. S. 166 . . .	155
— <i>v. Needham</i> , 2 Taunt. 278; 11 R. R. 572 . . .	28, 29, 136
<i>Thomas v. Cadwallader</i> , Willes, 496 . . .	86
— <i>v. Hayward</i> , L. R. 4 Ex. 311; 38 L. J. Ex. 175; 20 L. T. 814 . . .	65
— <i>v. Jones</i> , 2 J. & H. 475; 1 N. R. 138; 31 L. J. Ch. 732; 32 <i>id.</i> 139; 7 L. T. 154, 610; 1 De G. J. & S. 63; 10 W. R. 853; 11 <i>id.</i> 242; 8 Jur. N. S. 1124; 9 <i>id.</i> 161 153, 154, 158 . . .	
— <i>v. Packer</i> , 1 H. & N. 669; 26 L. J. Ex. 207 . . .	56
— <i>v. Thomas</i> , 2 Camp. 647 . . .	39
— <i>v. Thomas</i> , 2 K. & J. 79; 25 L. J. Ch. 159; 1 Jur. N. S. 1160 . . .	195, 196
<i>Tomkins v. Pincent</i> , 7 Mod. 97; 1 Salk. 141 . . .	72
<i>Thompson, Re</i> , 12 P. D. 100; 56 L. J. Prob. 46; 57 L. T. 373; 35 W. R. 384 . . .	241, 243
— <i>v. Bowyer</i> , 9 Jur. N. S. 863; 11 W. R. 975 . . .	218
— <i>v. Donaldson</i> , 3 Esp. 63; 6 R. R. 812 . . .	241

	PAGE
Thompson v. Ingham, 14 Q. B. 710; 19 L. J. Q. B. 189; 14 Jur. 429 . . . . .	275
— v. Lapworth, L. R. 3 C. P. 149; 37 L. J. C. P. 74; 17 L. T. 507; 16 W. R. 312 . . . . .	98, 99
— v. Reynolds, 3 C. & P. 123 . . . . .	162
— v. Simpson, 1 Drur. & War. 459; 2 J. & L. 110; 8 Ir. Eq. Rep. 55 . . . . .	215
— v. Tomkinson, 11 Exch. 442 . . . . .	257
Thomson v. Field, Cro. Jac. 499 . . . . .	72, 75
Thorn v. Woolcombe, 3 B. & Ad. 586 . . . . .	79
Thornewell v. Johnson, 50 L. J. Ch. 641; 44 L. T. 768; 29 W. R. 677 . . . . .	90
Thornton v. Sherratt, 8 Taunt. 529 . . . . .	102
Threlfall, <i>Re</i> , 16 Ch. D. 274; 50 L. J. Ch. 318; 42 L. T. 596; 44 <i>id.</i> 74; 28 W. R. 708; 29 <i>id.</i> 128 . . . . .	132
Thresher v. East London, 2 B. & C. 608; 4 D. & R. 62 . . . . .	87
Thunder v. Belcher, 3 East, 449 . . . . .	130, 134
Tichborne v. Mostyn, L. R. 8 C. P. 29; 41 L. J. C. P. 113; 26 L. T. 554; 20 W. R. 661 . . . . .	267
Tickle, <i>Re</i> , 3 M. B. R. 126 . . . . .	55, 100, 108
Tidball v. James, 29 L. J. Ex. 91 . . . . .	208
Tidswell v. Whitworth, L. R. 2 C. P. 326; 36 L. J. C. P. 103; 15 L. T. 574; 15 W. R. 427 . . . . .	99
Timmins v. Rowlinson, 3 Burr. 1603; 1 W. Bl. 533 . . . . .	44
Timms v. Baker, 49 L. T. 106 . . . . .	58, 80
Tinker v. Rodwell, 69 L. T. 591 . . . . .	196
Todheatley v. Benham, 40 Ch. D. 80; 58 L. J. Ch. 83; 60 L. T. 241; 37 W. R. 38 . . . . .	89, 90, 92
Toleman v. Portbury, L. R. 6 Q. B. 245; 7 <i>id.</i> 344; 40 L. J. Q. B. 125; 41 <i>id.</i> 98; 24 L. T. 24; 26 <i>id.</i> 292; 19 W. R. 623; 20 <i>id.</i> 441 . . . . .	69, 111, 231
Tolson v. Kaye, 3 B. & R. 217; 6 Moore, 542 . . . . .	194, 210
Tomkins v. Jones, 22 Q. B. D. 599; 58 L. J. Q. B. 222; 60 L. T. 939; 37 W. R. 328 . . . . .	268
Toms v. Wilson, 32 L. J. Q. B. 33, 382; 7 L. T. 421; 8 <i>id.</i> 799; 11 W. R. 117, 952; 9 Jur. N. S. 492; 10 <i>id.</i> 201; 4 B. & S. 442 . . . . .	73, 75
Torriano v. Young, 6 C. & P. 8 . . . . .	94
Toverson v. Jackson, [1891] 2 Q. B. 484; 61 L. J. Q. B. 36; 65 L. T. 332; 40 W. R. 37; 56 J. P. 21 . . . . .	134
Townson v. Tickell, 3 B. & Ald. 31 . . . . .	161, 162
Trash v. Wood, 4 My. & Cr. 324; 9 L. J. Ch. 105; 4 Jur. 669 . . . . .	167
Treloar v. Bigge, L. R. 9 Ex. 151; 43 L. J. Ex. 95; 22 W. R. 843 . . . . .	78
Trent v. Hunt, 9 Exch. 14; 22 L. J. Ex. 318; 17 Jur. 899 . . . . .	133
Trevivan v. Lawrance, 1 Salk. 276 . . . . .	33, 136
Tritton v. Bankart, 56 L. J. Ch. 629; 56 L. T. 306; 35 W. R. 474 . . . . .	92
Trotter v. Maclean, 13 Ch. D. 574; 49 L. J. Ch. 256; 42 L. T. 118; 28 W. R. 244 . . . . .	217

	PAGE
Trulock v. Robey, 12 Sim. 402; 5 Jur. 1101 . . . . .	218
Truscott v. Diamond Co., 20 Ch. D. 251; 51 L. J. Ch. 259; 46 L. T. 7; 30 W. R. 277 . . . . .	82, 83
Trustees' Co. v. Short, 13 App. Cas. 793; 58 L. J. P. C. 4; 59 L. T. 677; 37 W. R. 433; 53 J. P. 182 . . . . .	194, 198
Turner, <i>Re</i> , 29 Ch. D. 985; 53 L. T. 528 . . . . .	243, 246
— v. Cameron, 5 Exch. 932 . . . . .	123
— v. Doe, 9 M. & W. 643 . . . . .	47, 68
— v. Hodges, Hutton, 101; Hetley, 126 . . . . .	186
— v. Meymott, 7 Moore, 574; 1 Bing. 158 . . . . .	9, 11
Tutton v. Darke, 5 H. & N. 647; 29 L. J. Ex. 271; 2 L. T. 361; 6 Jur. N. S. 983 . . . . .	235, 236
Twiss v. Noblett, 4 Ir. Rep. Eq. 64 . . . . .	207
Twynham v. Pickard, 2 B. & Ald. 105 . . . . .	62
Tyerman v. Smith, 6 E. & B. 719; 25 L. J. Q. B. 359; 2 Jur. N. S. 360 . . . . .	252
Tyler v. Merchant Taylors Co., 15 P. D. 216; 60 L. J. Prob. 86; 63 L. T. 779 . . . . .	156
Tyley v. Seed, Skin. 649 . . . . .	37
Tyrwhitt v. Wynne, 2 B. & Ald. 554 . . . . .	223
.	
UMPHERY v. Damyon, 1 Bulstr. 181 . . . . .	73, 74
Underhay v. Read, 20 Q. B. D. 209; 57 L. J. Q. B. 129; 58 L. T. 457; 36 W. R. 298 . . . . .	134
Underwood v. Wing, 4 De G. M. & G. 633 . . . . .	242
Upton v. Townend, 17 C. B. 30; 25 L. J. C. P. 44; 1 Jur. N. S. 1089 233, 234 . . . . .	181
Uthwatt v. Elkins, 13 M. & W. 772; 14 L. J. Ex. 131 . . . . .	
.	
VANCE v. Vance, Ir. Rep. 5 C. L. 363 . . . . .	45
Vane v. Vane, 8 Ch. 383; 42 L. J. Ch. 299; 27 L. T. 534; 28 <i>id.</i> 320; 21 W. R. 66, 252 . . . . .	217
Varley v. Coppard, L. R. 7 C. P. 505; 26 L. T. 882; 20 W. R. 972 . . . . .	79
Vaughan, <i>Ex parte</i> , L. R. 2 Q. B. 114; 36 L. J. M. C. 17; 7 B. & S. 902; 15 L. T. 277; 15 W. R. 198 . . . . .	181, 182
Vaughan v. Atkins, 5 Burr. 2764 . . . . .	187, 188
Vernon v. Smith, 5 B. & Ald. 1 . . . . .	64, 95
— v. Wright, 7 H. L. C. 35; 2 Drew. 439; 23 L. J. Ch. 881; 28 <i>id.</i> 198; 4 Jur. N. S. 1113; 2 Eq. Rep. 1159 . . . . .	166
Victoria, A.-G. of, v. Ettershank, L. R. 6 P. C. 354; 44 L. J. P. C. 65; 24 W. R. 37 . . . . .	60, 108, 124
Viner v. Vaughan, 2 Beav. 466 . . . . .	93
Vivian v. Moat, 16 Ch. D. 730; 50 L. J. Ch. 331; 44 L. T. 210; 29 W. R. 504 . . . . .	51, 53

# TABLE AND INDEX OF CASES.

lxi

	PAGE
Voisey, <i>Ex parte</i> , 21 Ch. D. 442; 52 L. J. Ch. 121; 47 L. T. 362; 31 W. R. 19	132
Vooght v. Winch, 2 B. & Ald. 662	191
Vowles v. Young, 13 Ves. 140; 9 R. R. 154	245, 246
Vyryan v. Arthur, 1 B. & C. 410; 2 D. & R. 670	65
WADDILOVE v. Barnett, 4 Dowl. 347; 2 B. N. C. 538; 2 Scott, 763; 1 Hodges, 395	134
Wade v. Baker, 1 Ld. Raym. 180	176
Wadham v. Postmaster Gen., L. R. 6 Q. B. 644; 40 L. J. Q. B. 310; 24 L. T. 545; 19 W. R. 1082	58, 91
Wakesfield v. Brown, 9 Q. B. 209; 10 Jur. 853; 15 L. J. Q. B. 373	64
Walker v. Beauchamp, 6 C. & P. 552	246
— v. Giles, 6 C. B. 662; 18 L. J. C. P. 323; 13 Jur. 588, 753	132
— v. Godd, 6 H. & N. 594	39
— v. Hatton, 10 M. & W. 249; 2 Dowl. N. S. 263	82, 83, 88
Waller v. Andrews, 3 M. & W. 312; 1 H. & H. 87	100
Wallis v. Delmar, 29 L. J. Ex. 276	47
— v. Hands, (1893) 2 Ch. 75; 62 L. J. Ch. 586; 68 L. T. 428; 41 W. R. 471; 3 R. 351	51
Walrond v. Hawkins, L. R. 10 C. P. 342; 44 L. J. C. P. 116; 32 L. T. 119	92, 113
Walsh v. Fussell, 6 Bing. 163; 3 M. & P. 457	66
— v. Lonsdale, 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109	2, 50, 129
Walters v. Pfeil, M. & M. 362	163
— v. Webb, 9 Eq. 83; 5 Ch. 531; 39 L. J. Ch. 414, 677; 21 L. T. 657; 18 W. R. 86, 587	197
Ward v. Carrtar, 1 Eq. 29; 35 Beav. 171	195
— v. Clarke, 12 M. & W. 747; 1 D. & L. 1027; 13 L. J. Ex. 229; 8 Jur. 364	181
— v. Day, 4 B. & S. 337; 5 <i>id.</i> 359; 33 L. J. Q. B. 254; 10 L. T. 578; 12 W. R. 829	109, 110, 111
— v. Ryan, Ir. R. 10 C. L. 17	27, 30
— v. Ward, L. R. 6 Ch. 789	208
Warner's Case, Cro. Eliz. 461	18
Warren v. Murray, L. R. (1894) 2 Q. B. 648	205
Waterloo v. Cull, 1 E. & E. 213; 28 L. J. Q. B. 70; 29 <i>id.</i> 10; 5 Jur. N. S. 464, 1288	97
Waterpark v. Fennell, 7 H. L. C. 650; 7 W. R. 634; 5 Jur. N. S. 1135	230
Watkins, <i>Re</i> , 13 Ch. D. 252; 49 L. J. Bank. 7; 41 L. T. 565; 28 W. R. 127	150
Watkins v. Nash, 20 Eq. 262; 44 L. J. Ch. 505; 23 W. R. 647	250
Watson v. Atkins, 3 B. & Ald. 647	65, 96, 98
— v. Home, 7 B. & C. 235; 1 M. & Ry. 191	98
— v. Waltham, 2 A. & E. 485; 4 N. & M. 537	188

	PAGE
Weatherall v. Geering, 12 Ves. 504; 8 R. R. 369 . . .	79, 80
Weaver v. Bush, 8 T. R. 78 . . .	17
Webb v. Adkins, 14 C. B. 401; 2 C. L. R. 702; 23 L. J. C. P. 95 . .	162
— v. Russell, 3 T. R. 393; 1 R. R. 725 . . .	31, 60, 64
Webster v. Southey, 36 Ch. D. 9; 56 L. J. Ch. 785; 56 L. T. 879; 35 W. R. 622; 52 J. P. 36 . . .	203
Weddall v. Capes, 1 M. & W. 50; 1 Gale, 432 . . .	50
Weld v. Baxter, 11 Exch. 816; 25 L. J. Ex. 214; 26 <i>id.</i> 112; 1 H. & N. 568; 3 Jur. N. S. 91 . . .	31
Wellesley v. Withers, 4 E. & B. 750; 24 L. J. Q. B. 134; 1 Jur. N. S. 706 . . .	161
Wells, <i>Re</i> , 42 Ch. D. 646; 58 L. J. Ch. 835; 61 L. T. 588; 38 W. R. 229 . . .	155
— v. Attenborough, 24 L. T. 312; 19 W. R. 465 . . .	91
West v. Blakeway, 2 M. & Gr. 729; 5 Jur. 630; 3 Scott N. R. 199. 218; 9 Dowl. 846 . . .	112, 114
— v. Dobb, L. R. 4 Q. B. 634; 5 <i>id.</i> 460; 38 L. J. Q. B. 289; 9 B. & S. 755; 20 L. T. 737; 17 W. R. 879 . . .	58, 64, 67
— v. Fritche, 3 Exch. 216; 18 L. J. Ex. 50 . . .	133
— v. Houghton, 4 C. P. D. 197; 40 L. T. 364; 27 W. R. 678 . .	104
Weston v. Metrop. Asylums, 8 Q. B. D. 387; 9 <i>id.</i> 404; 51 L. J. Q. B. 399; 46 L. T. 166, 580; 30 W. R. 459, 623; 46 J. P. 564 . .	57
Wheatley v. Westminster Co., 9 Eq. 538; 39 L. J. Ch. 175; 22 L. T. 7 . . .	105
Wheeler v. Branscombe, 5 Q. B. 373; 13 L. J. Q. B. 83; 1 D. & M. 406 . . .	134
— v. Montefiore, 2 Q. B. 133; 6 Jur. 299; 1 G. & D. 493 . .	128
— v. Stevenson, 6 H. & N. 155; 30 L. J. Ex. 46; 3 L. T. 702; 9 W. R. 233 . . .	77, 233, 234
White v. Bayley, 10 C. B. N. S. 227; 30 L. J. C. P. 253; 7 Jur. N. S. 948 . . .	46
— v. Nicholson, 4 M. & Gr. 95; 4 Scott N. R. 707; 11 L. J. C. P. 264 . . .	94
— v. Wakley, 26 Beav. 16; 28 L. J. Ch. 77; 4 Jur. N. S. 988 . .	85
Whitmore v. Humphries, L. R. 7 C. P. 1; 41 L. J. C. P. 43; 25 L. T. 496; 20 W. R. 79 . . .	33, 34, 195
Whitton v. Peacock, 3 M. & K. 325; 2 Scott, 630; 2 B. N. C. 411 . .	62
Whitworth v. Humphreys, 5 H. & N. 185; 29 L. J. Ex. 113; 8 W. R. 215; 6 Jur. N. S. 231 . . .	256, 257
Whyman v. Garth, 8 Exch. 803 . . .	247
Wickenden v. Webster, 6 E. & B. 387; 25 L. J. Q. B. 264; 2 Jur. N. S. 590 . . .	89
Wight v. Dicksons, 1 Dow, 141 . . .	102
Wildbor v. Rainforth, 8 B. & C. 4; 2 M. & Ry. 185 . . .	9, 183
Wilkins v. Wingate, 6 T. R. 62 . . .	27
— v. Wood, 17 L. J. Q. B. 319; 12 Jur. 583 . . .	37
Wilkinson v. Calvert, 3 C. P. D. 360; 47 L. J. C. P. 679; 38 L. T. 813; 26 W. R. 829 . . .	36

# TABLE AND INDEX OF CASES.

lxiii

	PAGE
Wilkinson v. Colley, 5 Burr. 2694 . . . . .	40
—— v. Collyer, 13 Q. B. D. 1; 53 L. J. Q. B. 278; 51 L. T. 299; 32 W. R. 614 . . . . .	99
—— v. Hall, 3 R. N. C. 508; 4 Scott, 301; 3 Hodges 56 . . . . .	131, 221
—— v. Kirby, 15 C. B. 430; 23 L. J. C. P. 224; 1 Jur. N. S. 164; 2 C. L. R. 1387 . . . . .	190, 191
—— v. Rogers, 2 De G. J. & S. 62; 9 L. T. 434; 12 W. R. 119; 10 Jur. N. S. 5, 162 . . . . .	65, 89
Willesden v. Paddington, 3 B. & S. 593; 32 L. J. M. C. 109; 11 W. R. 425; 9 Jur. N. S. 874 . . . . .	36
Williams, Re, 34 Ch. D. 558; 56 L. J. Ch. 123; 55 L. T. 633; 35 W. R. 182 . . . . .	200
——, Re, 42 Ch. D. 93; 58 L. J. Ch. 451; 61 L. T. 58 . . . . .	158
—— v. Bosanquet, 1 B. & B. 238; 3 Moore, 500 . . . . .	64, 76, 128
—— v. Cheney, 3 Ves. 59 . . . . .	80
—— v. Currie, 1 C. B. 841 . . . . .	11
—— v. Earle, L. R. 3 Q. B. 739; 9 B. & S. 740; 37 L. J. Q. B. 231; 19 L. T. 238; 16 W. R. 1041 . . . . .	64, 66
—— v. Eyton, 2 H. & N. 771; 28 L. J. Ex. 146; 5 Jur. N. S. 770; 7 W. R. 291 . . . . .	252
—— v. Hayward, 1 E. & E. 1040; 28 L. J. Q. B. 374; 5 Jur. N. S. 1417; 7 W. R. 563 . . . . .	234
—— v. Heales, L. R. 9 C. P. 177; 43 L. J. C. P. 80; 30 L. T. 20; 22 W. R. 317 . . . . .	26, 232
—— v. Jones, 11 A. & E. 643 . . . . .	19
—— v. Pott, 12 Eq. 149; 40 L. J. Ch. 775 . . . . .	195, 207
Williamson v. Williamson, 17 Eq. 549; 9 Ch. 729; 43 L. J. Ch. 382, 738; 30 L. T. 154; 31 L. T. 291; 22 W. R. 632 . . . . .	66
Willis, re, 21 Q. B. D. 384; 57 L. J. Q. B. 634; 59 L. T. 749; 36 W. R. 639 . . . . .	132
—— v. Howe, (1893) 2 Ch. 545; 62 L. J. Ch. 690; 69 L. T. 358; 41 W. R. 433 . . . . .	217
Wilmot v. Freehold Co., 51 L. T. 552 . . . . .	261
Wilson v. Abbott, 3 B. & C. 88; 4 D. & R. 693 . . . . .	46
—— v. Hart, 1 Ch. 463; 2 H. & M. 551; 35 L. J. Ch. 569; 14 L. T. 499; 14 W. R. 748 . . . . .	65
—— v. Queen's Club, (1891) 3 Ch. 522; 60 L. J. Ch. 698; 65 L. T. 42; 40 W. R. 172 . . . . .	135
—— v. Wilson, 14 C. B. 616; 23 L. J. C. P. 137 . . . . .	94, 114
Windsor's Case, 5 Co. Rep. 24 b . . . . .	65
Wing v. Angrave, 8 H. L. C. 183; 30 L. J. Ch 65 . . . . .	242
Wingfield v. Tharp, 10 B. & C. 785 . . . . .	252
Winter v. Dumergue, 14 W. R. 281, 699; 12 Jur. N. S. 726 . . . . .	81
—— v. Perratt, 9 Cl. & F. 606 . . . . .	166
Wintle, re, 9 Eq. 373; 21 L. T. 781; 18 W. R. 394 . . . . .	243
Wisden v. Wisden, 2 Sm. & Giff. 396 . . . . .	159, 161
Withall v. Nixon, 28 Ch. D. 413; 54 L. J. Ch. 616; 33 W. R. 565; . . . . .	261, 265

	PAGE
<i>Wogan v. Doyle</i> , 12 L. R. Ir. 69 . . . . .	23
<i>Wollaston v. Hakewill</i> , 3 M. & Gr. 297; 3 Scott N. R. 593; 10 L. J. C. P. 203 . . . . .	79, 81, 232
<i>Wood v. Nunn</i> , 5 Bing. 10; 2 M. & P. 27 . . . . .	232
— <i>v. Wheeler</i> , 22 Ch. D. 281; 52 L. J. Ch. 144; 47 L. T. 440; 31 W. R. 117 . . . . .	261
<i>Woodcock v. Gibson</i> , 4 B. & C. 462; 6 D. & R. 524 . . . . .	190
<i>Woodroffe v. Doe</i> , 15 M. & W. 769; 2 H. L. C. 811, 7 Jur. 959; 13 <i>id.</i> 1013 . . . . .	208
<i>Woodhouse v. Balfour</i> , 13 P. D. 2 . . . . .	239
<i>Woodward v. Goulstone</i> , 11 App. Cas. 469; 56 L. J. Prob. 1; 55 L. T. 790; 35 W. R. 337 . . . . .	239
<i>Woolcock v. Dew</i> , 1 F. & F. 337 . . . . .	82
<i>Wooler v. Knott</i> , 1 Ex. D. 124, 265; 45 L. J. Ex. 313, 884; 34 L. T. 362; 35 <i>id.</i> 121; 24 W. R. 615, 1004 . . . . .	56, 91
<i>Woolley v. Clark</i> , 5 B. & Ald. 744; 1 D. & R. 409; 2 <i>id.</i> 158 . . . . .	162, 163
<i>Woolway v. Rowe</i> , 1 A. & E. 114 . . . . .	228, 229
<i>Worge v. Relf</i> , 11 L. J. M. C. 125 . . . . .	181
<i>Worsley v. Swann</i> , 51 L. J. Ch. 576 . . . . .	91
<i>Worsam v. Vandenbrande</i> , 17 W. R. 53 . . . . .	207
<i>Wrenford v. Gyles</i> , Cro. Eliz. 643 . . . . .	55
<i>Wrentmore v. Hagley</i> , 46 L. T. 741 . . . . .	264
<i>Wright v. Burroughes</i> , 3 C. B. 685; 15 L. J. C. P. 277; 16 <i>id.</i> 6; 10 Jur. 860; 4 D. & L. 226 . . . . .	9, 10, 62
— <i>v. Rogers</i> , L. R. 1 P. & D. 678; 2 <i>id.</i> 179; 38 L. J. P. & M. 67; 40 <i>id.</i> 8; 21 L. T. 156; 23 <i>id.</i> 569; 17 W. R. 833; 19 <i>id.</i> 192 . . . . .	239
— <i>v. Sanderson</i> , 9 P. D. 149; 53 L. J. Prob. 49; 50 L. T. 769; 32 W. R. 560 . . . . .	239
— <i>v. Tatham</i> , 1 A. & E. 3; 3 N. & M. 268 . . . . .	239
 <i>Xenos v. Wickham</i> , 13 C. B. N. S. 381; L. R. 2 H. L. 296; 31 L. J. C. P. 364; 36 <i>id.</i> 313; 16 L. T. 800; 16 W. R. 38 . . . . .	161
 <i>YARDLEY v. Holland</i> , 20 Eq. 428; 33 L. T. 301 . . . . .	215
<i>Yellowly v. Gower</i> , 11 Exch. 274; 24 L. J. Ex. 289 . . . . .	94
<i>Yeo v. Leman</i> , 2 Str. 1190 . . . . .	98
<i>Young v. Harris</i> , 65 L. T. 45 . . . . .	196
 <i>ZOUCH v. Forse</i> , 7 East 186 . . . . .	188
— <i>v. Willingale</i> , 1 H. Bl. 311; 2 R. R. 770 . . . . .	45



# TABLE OF STATUTES

	PAGE
6 Edw. 1, c. 5 . . . . .	93
13 Edw. 1, c. 18 . . . . .	145
5 Rich. 2, c. 8 . . . . .	24, 291
15 Rich. 2, c. 2 . . . . .	19, 24, 291
4 Hen. 4, c. 8 . . . . .	24, 292
8 Hen. 6, c. 9 . . . . .	19, 24, 292—294
s. 2 . . . . .	292
s. 3 . . . . .	22, 293
s. 4 . . . . .	22
s. 6 . . . . .	18, 23, 293
s. 7 . . . . .	23, 294
32 Hen. 8, c. 34 . . . . .	61, 62
31 Eliz. c. 11 . . . . .	22, 24, 294
21 Jac. 1, c. 4, s. 4 . . . . .	19
21 Jac. 1, c. 14 . . . . .	7
21 Jac. 1, c. 15 . . . . .	22, 24
12 Car. 2, c. 24, . . . . .	
s. 8 . . . . .	175, 176
s. 9 . . . . .	175, 176
29 Car. 2, c. 3, s. 3 . . . . .	50, 51, 295
8 Anne, c. 14 . . . . .	109
4 Geo. 2, c. 28, ss. 2—4 . . . . .	117
7 Geo. 2, c. 20, . . . . .	
s. 1 . . . . .	139, 141
s. 2 . . . . .	139
s. 3 . . . . .	140
11 Geo. 2, c. 19. . . . .	5, 295
s. 16 . . . . .	283, 284, 295
s. 17 . . . . .	284, 296
14 Geo. 3, c. 78, . . . . .	
s. 41 . . . . .	99
s. 83 . . . . .	95, 296
39 & 40 Geo. 3, c. 88, s. 4 . . . . .	152
41 Geo. 3, c. 109, s. 85 . . . . .	252
52 Geo. 3, c. 146, ss. 5, 6 . . . . .	243
57 Geo. 3, c. xxix. . . . .	95
57 Geo. 3, c. 52 . . . . .	5, 283, 297

W.Y.E.

	PAGE
59 Geo. 3, c. 12, . . . . .	
s. 12 . . . . .	182
s. 13 . . . . .	182
s. 17 . . . . .	180, 298
s. 24 . . . . .	6, 181, 182, 299
s. 25 . . . . .	6, 181, 182, 300
6 Geo. 4, c. 133, s. 33 . . . . .	99
1 & 2 Will. 4, c. 42, s. 3 . . . . .	182, 183
1 & 2 Will. 4, c. 59 . . . . .	182
2 Will. 4, c. 42 . . . . .	182, 301
3 & 4 Will. 4, c. 27, . . . . .	
s. 1 . . . . .	206, 212, 221, 225, 305
s. 2 . . . . .	212, 220
s. 3 . . . . .	152, 196, 199, 200, 202, 203, 207, 220, 306
s. 4 . . . . .	202, 203, 307
s. 5 . . . . .	152, 201, 211
s. 6 . . . . .	152, 200, 307
s. 7 . . . . .	202, 203, 204, 205, 207, 216, 307
s. 8 . . . . .	202, 205, 207, 308
s. 9 . . . . .	202, 206, 207, 308
s. 10 . . . . .	207, 308
s. 11 . . . . .	208, 308
s. 12 . . . . .	178, 308
s. 13 . . . . .	209, 309
s. 14 . . . . .	197, 209, 220, 309
s. 15 . . . . .	309
s. 16 . . . . .	210, 220
s. 17 . . . . .	211
s. 18 . . . . .	210, 310
s. 19 . . . . .	310
s. 20 . . . . .	201, 211, 310
s. 21 . . . . .	212, 213, 311
s. 22 . . . . .	213, 311
s. 23 . . . . .	213
s. 24 . . . . .	217, 311

e

	PAGE		PAGE
3 & 4 Will. 4, c. 27— <i>continued</i> .		7 Will. 4 and 1 Vict. c. 26— <i>continued</i> .	
s. 25 . . . . .	214, 215, 216, 220, 226, 311	s. 13 . . . . .	154, 326
s. 26 . . . . .	217, 311	s. 14 . . . . .	154, 326
s. 27 . . . . .	217, 312	s. 15 . . . . .	155, 326
s. 28 . . . . .	209, 216, 218	s. 16 . . . . .	155, 326
s. 29 . . . . .	222, 223, 312	s. 17 . . . . .	155, 327
s. 30 . . . . .	223, 313	s. 18 . . . . .	155, 327
s. 31 . . . . .	224, 313	s. 19 . . . . .	155, 327
s. 32 . . . . .	224, 313	s. 20 . . . . .	156, 327
s. 33 . . . . .	224, 313	s. 21 . . . . .	156, 327
s. 34 . . . . .	224, 314	s. 22 . . . . .	156, 328
s. 35 . . . . .	197, 314	s. 23 . . . . .	157, 328
s. 36 . . . . .	93, 314	s. 24 . . . . .	153, 328
s. 39 . . . . .	315	s. 25 . . . . .	157, 328
s. 41 . . . . .	315	s. 26 . . . . .	157, 328
s. 42 . . . . .	315	s. 27 . . . . .	158, 329
3 & 4 Will. 4, c. 87,		s. 28 . . . . .	159, 329
s. 2 . . . . .	252	s. 29 . . . . .	159, 329
s. 4 . . . . .	252	s. 30 . . . . .	160, 330
3 & 4 Will. 4, c. 106,		s. 31 . . . . .	160, 330
s. 1 . . . . .	164, 165, 166, 316	s. 32 . . . . .	160, 330
s. 2 . . . . .	164, 317	s. 33 . . . . .	160, 331
s. 3 . . . . .	165, 317	s. 34 . . . . .	161, 331
s. 4 . . . . .	166, 318	s. 35 . . . . .	331
s. 5 . . . . .	166, 318	7 Will. 4 and 1 Vict. c. 28 .	221, 331
s. 6 . . . . .	166, 318	1 & 2 Vict. c. 74,	
s. 7 . . . . .	167, 318	s. 1 . . . . .	5, 281, 282, 283, 332
s. 8 . . . . .	167, 319	s. 2 . . . . .	282, 333
s. 9 . . . . .	167, 319	s. 3 . . . . .	283, 333
s. 10 . . . . .	167, 319	s. 4 . . . . .	283, 334
s. 11 . . . . .	167, 320	s. 5 . . . . .	283, 334
s. 12 . . . . .	320	s. 6 . . . . .	283, 335
4 & 5 Will. 4, c. 76 . . . .	181	s. 7 . . . . .	283, 335
5 & 6 Will. 4, c. 69, s. 5, 6, 181, 183		1 & 2 Vict. c. 109 . . . . .	225
6 & 7 Will. 4, c. 85 . . . .	242	1 & 2 Vict. c. 110, s. 11 .	145, 147, 336
6 & 7 Will. 4, c. 86, s. 38 .	242	3 & 4 Vict. c. 31, s. 1 . . .	252
6 & 7 Will. 4, c. 115 . . . .	252	3 & 4 Vict. c. 77,	
7 Will. 4 and 1 Vict. c. 22 .	242	s. 19 . . . . .	5, 284, 337
7 Will. 4 and 1 Vict. c. 26,		s. 20 . . . . .	338
s. 3 . . . . .	64, 153, 187, 322	3 & 4 Vict. c. 84, s. 13 . .	285, 338
s. 4 . . . . .	323	3 & 4 Vict. c. 113, s. 7 . .	223
s. 5 . . . . .	152, 324	4 & 5 Vict. c. 38, ss. 17, 18 .	5, 285
s. 6 . . . . .	163, 325	5 & 6 Vict. c. 35, s. 103 . .	98
s. 7 . . . . .	154, 325	5 & 6 Vict. c. 97, s. 2 . . .	18
s. 8 . . . . .	154, 325	6 & 7 Vict. c. 54 . . . . .	223
s. 9 . . . . .	154, 325	8 & 9 Vict. c. 16, s. 135 . .	43
s. 10 . . . . .	155, 326	8 & 9 Vict. c. 18, s. 134 . .	43

# TABLE OF STATUTES.

lxvii

	PAGE		PAGE
8 & 9 Vict. c. 106, s. 3	51, 80, 339	22 & 23 Vict. c. 35— <i>continued</i> .	
8 & 9 Vict. c. 112	3	s. 4	117
s. 1	4, 340	s. 6	117
s. 2	4, 340	s. 8	117
8 & 9 Vict. c. 113, s. 1	249	s. 9	117
8 & 9 Vict. c. 118, s. 111	5, 285	s. 19	166, 347
9 & 10 Vict. c. 95, s. 122	275	s. 20	166, 347
11 & 12 Vict. c. 43,		23 & 24 Vict. c. 38, s. 6	114, 348
s. 33	283, 285		
s. 34	285	23 & 24 Vict. c. 126,	
11 & 12 Vict. c. 63	99	s. 1	117, 118, 348
14 & 15 Vict. c. 25, s. 1	46, 179	s. 2	117
14 & 15 Vict. c. 99, s. 14	243	ss. 3-11	117
14 & 15 Vict. c. 119	99	23 & 24 Vict. c. 136, s. 13	6, 258
15 & 16 Vict. c. 24	154, 341	25 & 26 Vict. c. 102, s. 96	99
15 & 16 Vict. c. 76,		27 & 28 Vict. c. 57, s. 12	286
s. 170	255	27 & 28 Vict. c. 112,	
s. 183	265	s. 1	145, 148, 348
s. 188	178	s. 2	348
s. 209	255, 272, 343	s. 3	149, 349
s. 210	12, 71, 75, 117, 118, 175, 282, 343	s. 4	149, 349
s. 211	117, 118, 344	s. 5	349
s. 212	72, 117, 118, 345	s. 6	350
s. 213	49, 190, 258, 345	29 & 30 Vict. c. 90, s. 10	99
s. 214	191, 346	32 & 33 Vict. c. 41, s. 1	95, 96
s. 219	140	32 & 33 Vict. c. 42	223
s. 220	140	33 Vict. c. 14	151
15 & 16 Vict. c. 79, s. 13	6, 286	33 & 34 Vict. c. 23	167
15 & 16 Vict. c. 150, s. 3	99	33 & 34 Vict. c. 102	151
17 & 18 Vict. c. 104, s. 282	241	34 & 35 Vict. c. 79	233
17 & 18 Vict. c. 125,		35 & 36 Vict. c. 39	151
s. 16	6	36 & 37 Vict. c. 66,	
s. 26	230, 247	s. 24	60, 140, 350
18 & 19 Vict. c. 120, s. 105	99	s. 24, sub-s. 1	1, 350
18 & 19 Vict. c. 121, s. 19	99	sub-s. 2	1, 142, 350
19 & 20 Vict. c. 108,		sub-s. 4	1, 351
s. 50	274, 276, 278	sub-s. 5	143
s. 51	274	sub-s. 6	2, 351
s. 52	274	sub-s. 7	2, 351
20 & 21 Vict. c. 77,		s. 25, sub-s. 2	217, 352
s. 62	240	sub-s. 5	2, 137, 352
s. 63	240	sub-s. 8	149, 352
s. 64	240	37 & 38 Vict. c. 35	193
22 Vict. c. 12, s. 5	6, 286	37 & 38 Vict. c. 54, s. 8	96
22 & 23 Vict. c. 35,		37 & 38 Vict. c. 57,	
s. 3	62, 347	s. 1	196, 197, 212, 352
		s. 2	196, 201, 202, 211, 215, 353

	PAGE		PAGE
37 & 38 Vict. c. 57— <i>continued</i> .		46 & 47 Vict. c. 52— <i>continued</i> .	
s. 3 . . . . .	197, 210, 215, 220, 354	s. 22, sub-s. 9 . . . . .	173
s. 4 . . . . .	197, 210, 354	s. 43 . . . . .	172
s. 5 . . . . .	197, 211, 215, 354	s. 44, sub-s. 1 . . . . .	171, 172
s. 6 . . . . .	213, 354	s. 45 . . . . .	146, 172
s. 7 . . . . .	216, 218, 219, 220, 355	s. 47 . . . . .	172
s. 8 . . . . .	193, 210, 221, 357	s. 48 . . . . .	172
37 & 38 Vict. c. 78, s. 5 . . . . .	169	s. 49 . . . . .	172
37 & 38 Vict. c. 88, s. 37 . . . . .	241	s. 50, sub-s. 4 . . . . .	173
38 & 39 Vict. c. 55,		s. 54 . . . . .	35
s. 94 . . . . .	99	s. 54, sub-s. 1 . . . . .	171
s. 150 . . . . .	99	2 . . . . .	171
38 & 39 Vict. c. 87, s. 48 . . . . .	169	3 . . . . .	171
41 & 42 Vict. c. 31, s. 6 . . . . .	132	4 . . . . .	173
42 & 43 Vict. c. 8 . . . . .	241	s. 55 . . . . .	35, 173
42 & 43 Vict. c. 59 . . . . .	93, 193	s. 57, sub-s. 2 . . . . .	173
44 & 45 Vict. c. 41 . . . . .	46	s. 83 . . . . .	173
s. 2, sub-s. 11 . . . . .	120, 357	s. 87, sub-s. 4 . . . . .	171
15 . . . . .	120, 358	s. 132 . . . . .	172
s. 4 . . . . .	170, 358	s. 138 . . . . .	172
s. 10 . . . . .	60, 63, 76, 358	s. 146 . . . . .	146
s. 11 . . . . .	60, 135, 358	s. 168, sub-s. 1 . . . . .	171
s. 12 . . . . .	60, 63, 359	46 & 47 Vict. c. 61,	
s. 14, sub-s. 1 . . . . .	69, 120,	s. 28 . . . . .	43, 366
121, 359		s. 33 . . . . .	36, 37, 367
2 . . . . .	120, 123, 359	s. 41 . . . . .	44, 367
3 . . . . .	123, 124, 360	s. 54 . . . . .	36, 136, 368
4 . . . . .	124, 360	49 & 50 Vict. c. 27,	
5 . . . . .	125, 360	s. 2 . . . . .	176
6 . . . . .	70, 119,	s. 3, sub-s. 1 . . . . .	176
120, 360		2 . . . . .	176
8 . . . . .	69, 120, 361	s. 4 . . . . .	176
9 . . . . .	78, 125, 361	50 & 51 Vict. c. 26, s. 4 . . . . .	136, 368
s. 18 . . . . .	135, 361	51 & 52 Vict. c. 43,	
s. 30 . . . . .	170, 363	s. 56 . . . . .	268, 369
s. 44, sub-s. 3 . . . . .	173, 174, 364	s. 59 . . . . .	268, 269, 270, 275, 369
s. 58 . . . . .	64, 364	s. 60 . . . . .	268, 370
s. 67 . . . . .	122, 365	s. 138 . . . . .	274, 275, 276, 277,
s. 69, sub-s. 1 . . . . .	126, 366	278, 279, 370	
8 . . . . .	126, 366	s. 139 . . . . .	232, 274, 275, 277,
45 & 46 Vict. c. 43, s. 9 . . . . .	132	278, 279, 371	
45 & 46 Vict. c. 75, s. 1 . . . . .	154, 366	s. 140 . . . . .	279, 372
46 & 47 Vict. c. 49 . . . . .	117, 140, 178,	s. 141 . . . . .	279, 372
260, 265		s. 142 . . . . .	279, 373
46 & 47 Vict. c. 52 . . . . .	100	s. 143 . . . . .	280, 373
s. 20, sub-s. 1 . . . . .	171	s. 144 . . . . .	280, 373
s. 21, . . . . .	2 . . . . .	s. 145 . . . . .	277, 280, 373
4 . . . . .	171, 172	s. 186 . . . . .	276, 374

## TABLE OF STATUTES.

lxix

	PAGE		PAGE
51 & 52 Vict. c. 51,		54 & 55 Vict. c. 76 . . .	99
s. 4 . . . . .	149	55 & 56 Vict. c. 13,	
s. 5 . . . . .	148	s. 2, sub-s. 1 . . .	122, 375
s. 6 . . . . .	148	2 . . .	70, 119, 120
52 & 53 Vict. c. 49,			375
ss. 1-12 . . . . .	7	s. 3 . . . . .	78, 376
s. 9 . . . . .	251	s. 4 . . . . .	123, 124, 376
53 & 54 Vict. c. 57,		s. 5 . . . . .	123, 124, 376
s. 1 . . . . .	136, 374	56 & 57 Vict. c. 63, s. 3 .	154, 377
s. 2, sub-s. 2 . . .	136, 374	56 & 57 Vict. c. 73, s. 6, sub-s. 1	
53 & 54 Vict. c. 71, s. 13 .	173		183, 377

#### ADDENDUM.

Page 65. A covenant by a lessee of a public house, to buy all beer from the lessor, runs with the land and reversion; *Clegg v. Hands*, 44 Ch. D. 503.

# THE LAW OF EJECTMENT.

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## CHAPTER I.

### RIGHT OF ENTRY.

To entitle a plaintiff to bring an action for the recovery of possession of land he must have a right of entry either legal or equitable. A right of entry means a right to enter and take actual possession of lands, tenements, or hereditaments, as incident to some estate or interest therein.

What is a right of entry

Before the Judicature Acts this right of entry must have been, in any court of common law, a *legal* right; a mere equitable title would have been insufficient to support an action of ejectment (a). Since the Judicature Acts all the courts are bound to give to a plaintiff, or to a defendant, the same relief upon an equitable title as the Court of Chancery would formerly have given (b). Now, therefore, a plaintiff claiming possession under an equitable title will succeed upon proof of an equitable right to the actual possession (c). The person in whom the legal

At common law right must be legal.

Since Judicature Acts, equitable right sufficient.

(a) *Doe v. Wroot*, 5 East, 132; (b) 36 & 37 Vict. c. 66, s. 24, *Doe v. Williams*, 2 M. & W. 749; sub-ss. 1, 2, 4. See App. B, *Doe v. Passingham*, 6 B. & C. 305; pp. 350—351.  
(c) *General Finance Co. v. Doe v. Webber*, 3 B. N. C. 922; *Goodtitle v. Jones*, 7 T. R. 43; *Liberator*, 10 Ch. D. 15, 24.  
*Doe v. Staple*, 2 T. R. 684.

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estate is vested must, however, be made a party to the proceedings (*d*).

Mortgagor  
can sue for  
possession.

A mortgagor also who is entitled to possession, or to the receipt of the rents and profits, may sue for such possession or rents if no notice of his intention to take possession has been given by the mortgagee (*e*).

Legal title in  
courts of  
equity.

Conversely, before the Judicature Acts, courts of equity would not usually grant relief to a plaintiff who had a *legal* title, though there were some exceptions to that rule (*f*); since those acts, courts of equity give the same effect to, and the same relief upon, legal titles as the courts of law (*g*).

Effect of Judi-  
cature Acts.

The effect of the Judicature Acts is that a tenant who has entered under an agreement for a lease, which is not valid as a lease, if he is entitled to specific performance, is in the same position as if a lease had been executed, and every branch of the high court will enforce his rights, as if a lease had actually been granted (*h*). In the county court, however, the tenant cannot assert that right if the value of the premises exceeds the equitable jurisdiction of county courts (*i*). If, however, the tenant is not entitled to specific performance, he is, under such circumstances, no more than a tenant at will or yearly tenant upon such terms of the agreement as are not inconsistent with a yearly tenancy (*h*).

Right of entry  
must be right  
to immediate  
possession.

The right of entry must be a right to the immediate

(*d*) *Allen v. Woods*, 68 L. T. 143.

(*e*) 36 & 37 Vict. c. 66, s. 25, sub-s. 5. See App. B, p. 352.

(*f*) *Howard v. Shrewsbury*, 17 qE. 378.

(*g*) 36 & 37 Vict. c. 66, s. 24, sub-ss. 6, 7. See App. B, p.

(*h*) *Walsh v. Lonsdale*, 21 Ch. D. 9; *Swain v. Ayres*, 21 Q. B. D. 289; *Coatsworth v. Johnson*, 55 L. J. Q. B. 220; *Lowther v. Heaver*, 41 Ch. D. 248. See p. 50.

(*i*) *Foster v. Reeves*, [1892] 2 Q. B. 255.



possession of the property. A reversionary or other future estate is not sufficient until it has become an estate in possession by the forfeiture, defeasance, or expiration of the prior estate. If, therefore, it is shown that there is a tenancy existing in any other person which is good against the plaintiff he cannot recover possession (*k*). So also if there is an outstanding term which has not been surrendered (*l*).

With regard to outstanding terms, before the statute 8 & 9 Vict. c. 112, a jury was sometimes directed to presume the surrender of a satisfied term. The mere fact that a term was satisfied, or the mere lapse of time, was not sufficient ground for such presumption, and a jury would be directed to make such a presumption only when the estate had been dealt with in a way in which reasonable men would not have dealt with it unless the term had been surrendered (*m*); or when the presumption was to be made in favour of a beneficial owner who had a title good in substance and only wanting this collateral matter to make it good in form (*n*).

Outstanding  
terms.

The Satisfied Terms Act (*n*) provides that every satisfied term, which was on the 31st of December, 1845, either by express declaration or by construction of law, attendant on the inheritance of any land, shall on that day cease as to such land; but that every term so attendant by express declaration shall continue to afford to everyone

Satisfied  
terms.

(*k*) *Doe v. Wharton*, 8 T. R. 2; *Doe v. Alford*, 1 D. & L. 470; *Doe v. Horn*, 3 M. & W. 333.

(*l*) See cases in next note.

(*m*) *Doe v. Staple*, 2 T. R. 684; *Doe v. Wrighte*, 2 B. & Ald. 710; *Doe v. Hilder*, 2 B. & Ald. 782; *Doe v. Plowman*, 2 B. & Ad. 573; *Doe v. Cooke*, 6 Bing. 174, 179; *Doe v. Langdon*, 12 Q. B. 711;

*Garrard v. Tuck*, 8 C. B. 231; *Cottrell v. Hughes*, 15 C. B. 532; *Evans v. Bicknell*, 6 Ves. 173, 185; *Doe v. Williams*, 2 M. & W. 749; *Doe v. Scott*, 11 East, 478; *Doe v. Reed*, 5 B. & Ald. 232; *Day v. Williams*, 2 C. & J. 460.

(*n*) 8 & 9 Vict. c. 112.

the same protection against charges, actions, and claims as if it had continued to subsist, but had not been assigned or dealt with after that date, and shall, for the purpose of giving such protection, be considered in every court of law or equity to be a subsisting term (*o*). Since that Act, only satisfied terms which were at its date, by express declaration, attendant upon the inheritance, can be set up to defeat a claim to the possession of the land, and then only when a jury would not be directed to presume its surrender (*p*), or a court of equity would not have restrained a party from setting it up (*q*).

By the same Act it is provided that terms then subsisting, or thereafter created, becoming satisfied since the 31st of December, 1845, and attendant either by express declaration or by construction of law, shall, immediately upon becoming so attendant, absolutely cease (*r*). In order that a term should cease under this section it must have become attendant upon the inheritance (*s*), and must be satisfied (*t*).

When a term  
is satisfied.

A term does not become satisfied unless the beneficial interest in the whole charge secured by the term, and the beneficial interest in the whole term, are united and merged in one person (*u*). A term attendant upon the inheritance can be dealt with only by those entitled to the inheritance, and an assignment thereof by a tenant for life is inoperative (*x*).

(*o*) S. 1 ; *Doe v. Price*, 16 M. & W. 803.

(*p*) *Ante*, p. 3.

(*q*) *Cottrell v. Hughes*, 15 C. B. 532 ; *Plant v. Taylor*, 7 H. & N. 211.

(*r*) S. 2.

(*s*) *Doe v. Jones*, 13 Q. B. 774.

(*t*) *Anderson v. Pignet*, 8 Ch. 180.

(*u*) *Anderson v. Pignet*, 8 Ch. 180, 189, per James, L.J.

(*x*) *Plant v. Taylor*, 7 H. & N. 211.

## CHAPTER II.

### THE SEVERAL REMEDIES FOR THE RECOVERY OF POSSESSION OF LAND.

THE usual remedies for the recovery of the possession of any lands, tenements or corporeal hereditaments situate in England, Wales or Berwick-upon-Tweed are :

- I. Entry. Post, chap. 3, p. 9.
- II. An action in the High Court. Post, chap. 22, p. 253.
- III. An action in the County Court, where the County Court has jurisdiction. Post, chap. 23, p. 263.
- IV. Summary proceedings before justices by a landlord against his tenant to recover possession of small tenements, after the expiration or determination of the tenancy under 1 & 2 Vict. c. 74, s. 1 ; post, chap. 24, p. 281.
- V. Summary proceedings before justices by a landlord against his tenant to recover possession of deserted premises, under 11 Geo. 2, c. 19, as amended by 57 Geo. 3, c. 52 ; post, chap. 24, p. 283.
- VI. Summary proceedings before justices to recover possession of :
  - (a) schoolhouses from the masters thereof, under 3 & 4 Vict. c. 77, s. 19, and 4 & 5 Vict. c. 38, ss. 17, 18 ; post, chap. 24, p. 285 ;
  - (b) of allotments, under 8 & 9 Vict. c. 118, s. 111 ; post, chap. 24, p. 285 ;

(c) of encroachments on lands to be enclosed, under 15 & 16 Vict. c. 79, s. 13; post, chap. 24, p. 286;

(d) of lands vested in the secretary of state for war, under 22 Vict. c. 12; post, chap. 24, p. 286;

(e) of parish or union houses or lands, under 59 Geo. 3, c. 12, ss. 24, 25, and 5 & 6 Will. 4, c. 69, s. 5; post, chap. 16, p. 180.

(f) of school and other buildings belonging to charities from officers or recipients, under 23 & 24 Vict. c. 136, s. 13; post, chap. 24, p. 286.

VII. After a forcible entry, or detainer, or an unlawful entry and forcible detainer, by indictment or inquisition before justices and a jury; post, chap. 4, pp. 21—24.

VIII. Under an arbitration and award.

#### Award.

Former procedure under C. L. P. Act, 1854, s. 16.

Formerly the procedure for recovering possession under an award was regulated by the Common Law Procedure Act, 1854 (a). Under that act, where an award was made on any submission directing that possession of any lands or tenements capable of being the subject of an action of ejectment should be delivered to any party, or that any such party was entitled to the possession thereof, and the submission was or was not made a rule of court (b), the court might order any party in possession or any person claiming through or under him by title subsequent to the date of the submission, to deliver possession to the party entitled thereto under the award. This order had the effect of a judgment in ejectment, and might be enforced in the same way.

(a) 17 & 18 Vict. c. 125, s. 16.

(b) *Davey v. Railway Assurance Co.*, 49 L. J. Ch. 568.

These provisions are now repealed by the Arbitration Act, 1889 (c), which provides (d) that "a submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court or a judge," and shall have the same effect in all respects as if it had been made an order of court; and an award on a submission may, by leave of the court or judge, be enforced in the same manner as a judgment or order to the same effect (f). If after an award the successful party brings an action of ejectment, the award precludes the other party from disputing his title (g).

Present procedure under Arbitration Act, 1889, ss. 1-12.

IX. The crown may recover possession of lands by an information of intrusion exhibited by the attorney-general (h). The crown had not the right of its prerogative to lay the venue in any county it chose, or to have the hearing in a different county from that in which the venue was laid (i); now local venues are abolished altogether except where it is otherwise provided by statute (k).

Information of intrusion.

The defendant to an information of intrusion cannot plead the general issue, but must specially plead his own title, unless the crown has been out of possession for more than twenty years, and then the onus is on the crown to prove its title (l).

What defendant must plead.

A grantee or lessee of the crown may recover possession by action of ejectment (m).

Grantee from Crown.

X. An action for recovery of land cannot be maintained against the crown or any of its immediate officers or

Petition of right.

(c) 52 & 53 Vict. c. 49; *Smith & W.* 171, overruling on that point *Att.-Gen. v. Parsons*, 2 M. & W. 23.

(d) S. 1.

(f) S. 12.

(g) *Doe v. Rosser*, 3 East, 15.

(h) *Manning's Practice*, p. 198; *Cole, Eject.* p. 62.

(i) *Att.-Gen. v. Churchill*, 8 M.

(k) R. S. C. Ord. 36, r. 1.

(l) 21 Jac. 1, c. 14; *Att.-Gen. v. Parsons*, 2 M. & W. 23.

(m) *Doe v. Roberts*, 13 M. & W.

520.

servants in possession on its behalf, and any such proceedings will be stayed upon a summary application by the attorney-general (n). The remedy is by petition of right (o).

(n) *Doe v. Roe*, 8 M. & W.  
579.

(o) *Sadlers' case*, 4 Co. Rep.  
55 a; Ad. Eject. p. 16.

## CHAPTER III.

### ENTRY.

ANY person who has a right to the immediate possession of land may proceed to recover such possession by means of any one of the remedies enumerated in the preceding chapter which may be applicable to his case. He may either take legal proceedings, or he may enter upon the land and take actual possession thereof. Even if he has taken legal proceedings and obtained judgment for possession, he is not precluded from entering and taking actual possession; and this is so although the judgment is for possession after a certain time which has not expired (*p*). Entry.  
After legal proceedings.

He may either enter himself (*q*), or he may for this purpose employ any person as his agent (*r*). The authority of an agent need not be given in any formal manner (*s*), except that a corporation aggregate cannot authorise an entry for condition broken otherwise than by deed (*t*). He may subsequently ratify and adopt an entry made on his behalf by a stranger (*s*). A demise may be made to a tenant, who may then enter (*u*). Entry by agent.

(*p*) *Jones v. Foley*, [1891] 1 Q. B. 730.

(*q*) *Taylor v. Cole*, 3 T. R. 292; *Davis v. Burrell*, 10 C. B. 821; *Wildbor v. Rainforth*, 8 B. & C. 4; *Turner v. Meymott*, 1 Bing. 158; *Wright v. Burroughes*, 3 C. B. 685; *Taunton v. Costar*, 7 T. R. 431; *Lows v. Telford*, 1 App. Cas. 414.

(*r*) *Butcher v. Butcher*, 7 B. & C. 399; *Hey v. Moorhouse*, 6 B. N. C. 52; *Jones v. Chapman*, 2 Exch. 803; *Jones v. Foley*, [1891] 1 Q. B. 730.

(*s*) *Fitchet v. Adams*, 2 Strange, 1128.

(*t*) 1 Rolle Abr. 514.

(*u*) *Doe v. Wood*, 2 B. & Ald. 724.

**Mode of entry.** A lawful entry upon any part of the property in the name of the whole enures as an entry into every part (*x*), unless the land be in different counties, when a separate entry must be made in each county (*y*). If there be two or more disseisors, as their seisin is distinct, so also must be the act which divests that seisin (*z*). The person entering need only do some act upon the premises showing his intention to take possession (*a*).

**Effect of entry.**

Where a person having a right of entry has entered, and has become peaceably and lawfully possessed, he becomes possessed of such an estate as was vested in him before and at the time of his entry (*b*). A surrenderor of copyholds, or a lessor, who enters for conditions broken is entitled to possession free from the surrender or the lease (*c*).

**Ousting occupiers.**

When a person has so entered and become possessed, he may turn out all previous occupiers, or other persons, as trespassers, using no more force than is necessary (*d*); or may bring an action of trespass against them (*e*). If, however, his entry is made under such circumstances as to be a forcible entry (*f*), he is liable in damages for any independent wrong or injury done to the occupier or other person, such as an assault or injury to property (*g*); but he is not

(*x*) Litt. s. 417; *Cotton's case*, Cro. Eliz. 189.

(*y*) Co. Lit. 252 b.

(*z*) *Id.*

(*a*) *Butcher v. Butcher*, 7 B. & C. 399; *Hey v. Moorhouse*, 6 B. N. C. 52; *Doe v. Wood*, 2 B. & Ald. 724, 741.

(*b*) *Spotswood v. Barrow*, 5 Exch. 110, 113; *Doe v. Woodroffe*, 10 M. & W. 608, 632; *Lows v. Telford*, 1 App. Cas. 414.

(*c*) *Simonds v. Lawnd*, Cro. Eliz. 239.

(*d*) *Wright v. Burroughes*, 3 C. B. 685; *Harvey v. Brydges*, 14 M. & W. 437; *Browne v. Dawson*, 12 A. & E. 624; *Hey v. Moorhouse*, 6 B. N. C. 52; *Blades v. Higgs*, 30 L. J. C. P. 347; *Scott v. Brown*, 51 L. T. 746.

(*e*) *Butcher v. Butcher*, 7 B. & C. 399; *Hey v. Moorhouse*, 6 B. N. C. 52.

(*f*) *Jones v. Foley*, [1891] 1 Q. B. 730. See Chap. 4.

(*g*) *Beddall v. Mailland*, 17 Ch. D. 174; *Edwick v. Hawkes*,



liable to an action for trespass to the land (*h*), though he may have broken open doors (*i*), or pulled down the premises (*k*). If the entry is forcible he is liable to be indicted (*l*), but he can retain the possession which he has acquired, unless a writ of restitution is awarded upon a prosecution for the forcible entry (*m*).

If he is sued for trespass, he may answer that the land was his freehold, or was not the land of the plaintiff, and that he entered by virtue of a lawful title (*n*). If sued for assault he must plead that he was lawfully possessed of the land, and committed the acts complained of in defence of his possession (*o*).

If the right to enter and take actual possession be clear and free from all doubt, the remedy by entry may, in many cases, be preferable to the remedy by legal proceedings, as saving delay and expense. On the other hand, if there be any doubt as to the right to enter, it is better to proceed by law, and to have the right judicially determined in the first instance; for the person entering may be sued for trespass or assault, and be mulcted in heavy damages, if he has been mistaken as to his right to enter, or has asserted that right in an unlawful manner (*p*); or may be harassed by having his cattle dis-

18 Ch. D. 199; *Newton v. Harland*, 1 M. & Gr. 644; *Jones v. Foley*, [1891] 1 Q. B. 730.

(*h*) *Davison v. Wilson*, 11 Q. B. 890; *Burling v. Read*, 11 Q. B. 904; *Taunton v. Costar*, 7 T. R. 431; *Harvey v. Brydges*, 14 M. & W. 437; *Browne v. Dawson*, 12 A. & E. 624; *Blades v. Higgs*, 30 L. J. C. P. 347; *Pollen v. Brewer*, 7 C. B. N. S. 371.

(*i*) *Turner v. Meymott*, 1 Bing. 158.

(*k*) *Burling v. Read*, 11 Q. B.

904.

(*l*) See Chap. 4.

(*m*) See pp. 21—24.

(*n*) *Jones v. Chapman*, 2 Exch. 803; *Browne v. Dawson*, 12 A. & E. 624; *Burling v. Read*, 11 Q. B. 904; *Harvey v. Brydges*, 14 M. & W. 437, 442; *Davison v. Wilson*, 11 Q. B. 890.

(*o*) *Roberts v. Tayler*, 1 C. B. 117.

(*p*) *Merest v. Harvey*, 5 Taunt. 442; *Williams v. Currie*, 1 C. B. 841.

trained damage feasant (*q*). There is also the danger of being indicted (*r*) for forcible entry; the law relating to forcible entries and detainers is by no means clear, and there is always a danger of being guilty of some excess of force or violence in taking possession, especially where resistance is offered. There are often advantages to be gained by taking legal proceedings instead of entering and taking possession: a title to possession judicially determined is much less likely to be questioned than one gained by entry only; and, under the C. L. P. Act, 1852 (*s*), an action to recover possession for non-payment of rent may, in some cases, be brought, though no actual entry could be made, because no demand of payment had been made (*t*).

(*q*) *Taunton v. Costar*, 7 T. R. 431.

(*r*) *Post*, Chap. 4.

(*s*) 15 & 16 Vict. c. 76, *post*, p. 77.

(*t*) S. 210, *post*, p. 77.

## CHAPTER IV.

### FORCIBLE ENTRY AND DETAINER.

A PERSON who makes a forcible entry upon lands or tenements, whether he is entitled to the possession or not, commits an unlawful act (*a*), and is liable either to an indictment at common law (*b*), or to criminal proceedings under the statutes relating to forcible entry, and to be compelled to restore possession of the property to the person whom he has dispossessed (*c*).

Forcible  
entry.

Criminal  
proceedings.

In certain cases, if the person entering forcibly is not entitled to the possession, damages for the forcible entry can be recovered against him by the person upon whose possession such forcible entry has been made, under the statute 8 Hen. 6, c. 9 (*d*); or in an ordinary action of trespass, in which the damages will probably be large, on account of the violence (*e*). If the person entering forcibly is entitled to possession, no action for trespass in respect of the entry will lie against him (*f*), but for any independent wrong (such as an assault, or injury to furniture) committed in the course of the forcible entry, damages can be recovered by the person injured (*g*).

Action for  
trespass.

(*a*) *Pollen v. Brewer*, 7 C. B. N. S. 371; *Newton v. Harland*, 1 M. & Gr. 644; *Edwick v. Hawkes*, 18 Ch. D. 199; *Lowe v. Telford*, 1 App. Cas. 414.

(*b*) *R. v. Blake*, 3 Burr. 1731; *R. v. Wilson*, 8 T. R. 357; *post*, p. 17.

(*c*) *Post*, pp. 21—24.

(*d*) *Post*, p. 18.

(*e*) See p. 11.

(*f*) See pp. 10—11.

(*g*) *Beddall v. Maitland*, 17 Ch. D. 174; *Edwick v. Hawkes*, 18 Ch. D. 199; *Beattie v. Mair*, 10 L. R. Ir. 208; see *Jones v. Foley*, [1891] Q. B. 730. See p. 10.

What  
amounts to  
force.

An entry into or upon any lands or tenements made with a strong hand, or with multitude of people, in order to take or obtain possession, whether the person entering has or has not a right to the possession, is a forcible entry within the meaning of the statutes, and at common law, although no one is assaulted; for if the entry is made either with personal violence, or with offensive weapons, or with other show of force or menace calculated to excite terror or alarm, or to deter the person in possession from sending away the aggressors, and resuming or retaining his possession, this is a forcible entry (*h*). There must be proof of such force, or at least of such show of force, as is calculated to prevent resistance, and not merely of that amount of force which is implied in nearly every civil trespass (*i*). The actual number present is not material (*k*), for a single person may make a forcible entry (*l*), the question in all cases being whether or not force is shown (*m*). A multitude of people is generally understood to mean ten or more, but there is no definite rule upon this point; it is a question of fact upon the circumstances of each case (*n*).

The mere putting back of a bolt, or lifting a latch, is a forcible entry, if accompanied with other show of violence (*o*). An entry by an open window, or by unlocking a door, or by a mere trick, as by enticing out the owner and then shutting the door (*p*), or

(*h*) Co. Lit. 257 b; Com. Dig., Forcible Entry (A 2); Hawk. P. C., I. c. 64, ss. 20, 21; *Milner v. Maclean*, 2 C. & P. 17; *R. v. Wilson*, 8 T. R. 357.

(*i*) *R. v. Smyth*, 5 C. & P. 201; *R. v. Storr*, 3 Burr. 1698; *R. v. Atkins*, 3 Burr. 1706; see *R. v. Blake*, 3 Burr. 1731; *R. v. Wilson*, *supra*; *Jones v. Foley*, [1891] 1

Q. B. 730.

(*k*) *R. v. Blake*, *supra*.

(*l*) Hawk. P. C., I. c. 64, s. 29; Co. Lit. 257, a, b; *Lamb, Eiren.* 135.

(*m*) *R. v. Blake*, 3 Burr. 1731.

(*n*) Com. Dig., Forcible Entry (A 2); Co. Lit. 257 a.

(*o*) *Beadle v. Orme*, Noy, 136.

(*p*) Com. Dig., Forcible Entry

an entry accompanied by mere threats of injury to property, and not of personal violence, is not a forcible entry, without there be further violence (*q*). If, however, the absent owner be forcibly prevented from returning, and persons are sent to take peaceable possession in his absence, this is forcible entry (*r*).

If a person entitled to possession enter peaceably, and if after entry made and before actual and complete possession has been obtained, violence is used towards the person in possession, that is a forcible entry, and criminal (*s*). A licence by a tenant to his landlord to enter and turn him out by force is void, as being in effect a licence to commit that which is a crime (*t*).

Licence to enter forcibly.

If several go in company and all but one enter peaceably, and that one enter forcibly, then, if the entry be lawful, only the one who actually uses force is guilty of a forcible entry; but if the entry be not lawful, then all are guilty of a forcible entry (*u*), whether they all enter at the same time or at different times (*x*), and whether they actually come upon the land or not (*y*), and, in the case of an ordinary dwelling-house, although no one was in it at the time (*z*); but if a man merely assents to a forcible entry made on his behalf without his knowledge or privity, he is not guilty of a forcible entry (*a*).

Entry by several, one using force.

A joint tenant, or tenant in common, if he forcibly

Joint tenants and tenants in common.

(A 3); Hawk. P. C., I. c. 64, s. 26.

(*q*) Hawk. P. C., I. c. 64, s. 26.

(*r*) *Id.* s. 26.

(*s*) Vin. Abr., Forcible Entry (A 5, 6); Hawk. P. C., I. c. 64, s. 27; *Edwick v. Hawkes*, 18 Ch. D. 199. See p. 10.

(*t*) *Edwick v. Hawkes*, *supra*.

(*u*) Bac. Abr., Forcible Entry

(B); Dalton, 297.

(*x*) *Bead v. Orme*, Noy, 136; Vin. Abr., Forcible Entry (A 10).

(*y*) Hawk. P. C., I. c. 64, s. 22.

(*z*) *Bead v. Orme*, *supra*.

(*a*) Hawk. P. C., I. c. 64, s. 24; Bac. Abr., Forcible Entry (B); Vin. Abr., Forcible Entry (A 4).

enters upon the land, or forcibly ejects or keeps out of possession his co-tenant, is guilty of a forcible entry (*b*).

Who may prosecute.

If the legal possession is in any person, whether he has obtained it by force or otherwise, he is entitled to indict any other persons who enter forcibly, even those whom he himself dispossessed (*c*).

Forcible detainer.

Forcible detainer is where a man, having entered forcibly, or peaceably but unlawfully, afterwards detains possession by force (*d*). The same circumstances of force and violence which will make an entry forcible (*e*) will also make a detainer forcible. Mere refusal to go out on request, or a passive resistance to expulsion, or a barricading of the house, is not sufficient to constitute a forcible detainer. There must be some actual menaces, intimidation, or personal violence (*f*). A detainer may be forcible though no attempt to enter be made (*g*).

Peaceable and lawful entry.

A person who has a right to the possession, and enters peaceably, cannot be convicted for a subsequent forcible detainer of possession (*h*). A tenant for years, or at will, who, after the term is ended or the will determined, forcibly detains possession from the reversioner, is perhaps guilty of a forcible detainer (*i*).

Forcible entry may be resisted.

A forcible entry may be resisted by the person lawfully

(*b*) Bac. Abr., Forcible Entry (D); Hawk. P. C., I. c. 64, s. 33; Vin. Abr., Forcible Entry (A 14).

(*c*) *Lowes v. Telford*, 1 App. Cas. 414.

(*d*) Com. Dig., Forcible Entry (B); 15 Ric. 2, c. 2; 8 Hen. 6, c. 9; *R. v. Oakley*, 4 B. & Ad. 307.

(*e*) *Ante*, p. 14.

(*f*) Hawk. P. C., I. c. 64, s. 30; Com. Dig., Forcible De-

tainer (B 2).

(*g*) *Snigge v. Shirton*, Cro. Jac. 199; *R. v. Wilson*, 3 A. & E. 817.

(*h*) *Taylor v. Cole*, 3 T. R. 292, 295.

(*i*) *Snigge v. Shirton*, Cro. Jac. 199; *R. v. Oakley*, 4 B. & Ad. 307, 312; *R. v. Wilson*, 3 A. & E. 817; Hawk. P. C., I. c. 64, s. 23; see Burns' Justice, II. 598 (ed. 30).

in possession, without any previous request to desist, for "there is a manifest distinction between endeavouring to turn a man out of a house or close into which he has previously entered quietly, and resisting a forcible attempt to enter. In the first case a request is necessary, in the latter not" (*k*).

The person injured may prefer an indictment under the statutes for a forcible entry or detainer at the quarter sessions or the assizes (*l*). The indictment must set out the nature of the estate of the party on whose possession the forcible entry was made (*m*). If he has a fee simple, the indictment is sufficient, if it allege that he was seised, and in possession (*n*); if he has an estate tail or for life merely, it should be described as such; while if he has only an estate for a term of years the indictment should allege an entry into the freehold of A. in the possession of B. (*o*). Possession is *prima facie* proof of seisin, but this presumption may be rebutted (*p*).

Indictment.

Under statutes.

An indictment will lie at common law for a forcible entry with strong hand, or with multitude of persons in a violent and tumultuous manner in breach of the public peace (*q*), not for a mere trespass *vi et armis* and unlawful expulsion from the land (*r*). The indictment must charge

At common law.

(*k*) *Polkinhorn v. Wright*, 8 Q. B. 197; *Green v. Goddard*, 2 Salk. 641; *Weaver v. Bush*, 8 T. R. 78.

(*l*) *R. v. Harland*, 8 A. & E. 826. For statutes, see App. B, pp. 291—294.

(*m*) *R. v. Wannop*, Sayer, 142; *R. v. Bathurst*, Sayer, 225; *R. v. Blake*, 3 Burr. 1731; *R. v. Wilson*, 8 T. R. 357, 360; but see *R. v. Child*, 2 Cox, C. C. 102.

(*n*) *R. v. Hoare*, 6 M. & S. 266; *Ellis's case*, Cro. Jac. 634; *R. v. Griffith*, 3 Salk. 169; *R. v. Wilson*, *supra*.

(*o*) *R. v. Griffith*, *supra*.

(*p*) See p. 227. See *R. v. Child*, 2 Cox, C. C. 102; *Jayne v. Price*, 5 Taunt. 326.

(*q*) *R. v. Blake*, 3 Burr. 1731.

(*r*) *R. v. Storr*, 3 Burr. 1698; *R. v. Atkins*, *Id.* 1706; *R. v. Wilson*, 8 T. R. 357, 360.

the defendant with having used such a degree of force as constitutes a public breach of the peace (s). It is not necessary at common law to set out the estate of the prosecutor; it is sufficient if the indictment allege that he was possessed (t).

Indictment  
must allege  
force.

It must appear on the face of the indictment, either under the statutes or at common law, that the entry was made in such a manner as to be an indictable offence; merely to allege that it was with "force and arms," without "with a strong hand," is not sufficient, as such force must be shown as implies a breach of the public peace (u). The words "with a strong hand" imply sufficient violence, and an indictment alleging that the defendants with force and arms, and with a strong hand, unlawfully entered and expelled, is sufficient (x). The actual number alleged to be present is almost immaterial if no force be shown (y).

8 Hen. 6,  
c. 9. Action  
for trespass.

Under the statute 8 Hen. 6, c. 9 (z), a *freeholder* may bring an action for trespass for a forcible entry or detainer. This remedy is given to the "disseissor," and a disseissor is one who takes the freehold (a); if, therefore, the person's possession is unlawful he cannot recover any damages (b). The plaintiff may recover treble damages as well for the mesne occupation as for the wrongful entry, together with full costs, charges, and expenses, pursuant to 5 & 6 Vict. c. 97, s. 2, in lieu of the treble costs to which he was formerly entitled under the statute (c), but not the costs

(s) *R. v. Wilson, supra.*

(t) Arch. Crim. Plead. p. 966 (ed. 21).

(u) *R. v. Blake*, 3 Burr. 1731; *Warner and Collins' case*, Cro. Eliz. 461.

(x) *R. v. Wilson*, 8 T. B. 357.

(y) *R. v. Blake, supra.*

(z) S. 6.

(a) Anon., 3 Salk. 169; *Cole v. Eagle*, 8 B. & C. 409.

(b) *Beddall v. Matland*, 17 Ch. D. 174, 188.

(c) *Milner v. Maclean*, 2 C. & P. 17, note (c); Co. Lit. 257 b.



of prosecuting the defendant for the forcible entry (*d*). The defendant may plead "not guilty by statute" (*e*), and under such defence he may dispute the plaintiff's title and raise any defence under the statute or at common law (*f*). The right to plead "not guilty by statute" is preserved by the Rules of the Supreme Court, 1883 (*g*), and the mode of pleading it is there prescribed (*h*), but if such defence is pleaded, the defendant cannot without leave plead any other defence to the same cause of action (*g*). In this action restitution cannot be awarded (*i*). Plea of not guilty.

By the statute 15 Rich. 2, c. 2, a forcible detainer, when preceded by a forcible entry, is an offence cognizable by justices in a summary way, and by the statute 8 Hen. 6, c. 9, a forcible detainer, when preceded by a peaceable but unlawful entry (*k*), and perhaps also in some cases a forcible detainer even when the entry was peaceable and lawful (*l*), is an offence so cognizable. Under the latter statute justices may also summon a jury to inquire into any forcible entry or forcible detainer. Summary jurisdiction of justices.  
Forcible entry.  
Forcible detainer.

When complaint is made to a justice of the peace of a forcible entry and forcible detainer, or of an unlawful entry and forcible detainer (which complaint may be made orally and without oath), the justice should take sufficient force and go to the house or other place mentioned, and then upon his own view ascertain whether the place is holden by force; and for this purpose he may order outer doors to be broken open. If he be satisfied that it is so held Viewing the force.

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|---|--|
| ( <i>d</i> ) <i>Pocock v. Faulks</i> , 10 Times Rep. 183.   | B. 890.  |
| ( <i>e</i> ) 21 Jac. 1, c. 4, s. 4.   | ( <i>g</i> ) Ord. XIX. r. 12.  |
| ( <i>f</i> ) <i>Ross v. Clifton</i> , 11 A. & E. 631; <i>Maund v. Monmouth</i> , Car. & M. 606; <i>Anon.</i> , 3 Salk. 169; see <i>Williams v. Jones</i> , 11 A. & E. 463; <i>Davison v. Wilson</i> , 11 Q. | ( <i>h</i> ) Ord. XXI. r. 19.<br>( <i>i</i> ) Vin. Abr., Forcible Entry (I 5).<br>( <i>k</i> ) <i>Reg. v. Oakley</i> , 4 B. & Ad 307.<br>( <i>l</i> ) <i>Ante</i> , p. 16. |

## Procedure.

he may either arrest the offender on the spot and remove the force or, if he adjourn to another place, he must summon the offender to appear before him to answer the charge. In any case he must examine witnesses in order to ascertain the nature of the defendant's entry, whether it was forcible, or peaceable but unlawful. The inquiry may take place on the spot in the defendant's presence, or if it is adjourned elsewhere, the defendant must have notice in order that he may have the opportunity, if he wishes, of being heard. If after such notice he fails to appear, the inquiry may proceed in his absence (*m*). The justice's own view can only be evidence of the forcible detainer, and is sufficient for that purpose without the necessity of hearing evidence on that point (*n*). If the justice is satisfied that the offence has been committed he should commit the defendant and make a record of the force (*o*).

Conviction,  
what it must  
show.

The conviction must show that the justice did inquire, that the defendant had notice, and had an opportunity of being heard (*p*), the nature of the entry, and probably the facts from which the nature of the entry is inferred (*q*); it is not sufficient to state merely the fact of the prosecutor having complained (*r*). The conviction must also show that a fine was imposed (*s*), and that the offender was committed until the fine was paid (*t*), though the amount of the fine may be fixed after the conviction (*u*).

The Queen's Bench will not compel justices to exercise their summary jurisdiction by granting a mandamus (*x*).

(*m*) *R. v. Wilson*, 3 A. & E. 817; *R. v. Oakley*, 4 B. & Ad. 307.

(*n*) *Hawk. P. C.*, I. c. 64, s. 60;  
*R. v. Wilson*, *supra*.

(*r*) *R. v. Wilson*, *supra*; *R. v. Oakley*, *supra*.

(*o*) *Vin. Abr.*, Forcible Entry  
(F 10).

(*s*) *R. v. Elwell*, 2 L. Ray. 1514.

(*p*) *Attwood v. Joliffe*, 3 New  
Sess. Cas. 116.

(*t*) *R. v. Hord*, Sayer, 176.

(*u*) *R. v. Layton*, 1 Salk. 353.

(*q*) *R. v. Wilson*, 3 A. & E.

(*x*) *Ex parte Davy*, 2 Dowl

A single justice may execute this summary jurisdiction (*y*). In cities, towns, and boroughs having franchise, the mayors, justices, sheriffs and bailiffs have like power as justices elsewhere to remove forcible entries, etc. ; so, too, has the lord mayor of London (*z*).

Restitution of possession can be granted either where proceedings have been taken by indictment under the statutes, or where summary proceedings have been taken before justices ; but not after an indictment at common law. Restitution.

In the case of an indictment at the assizes or quarter sessions, if the grand jury find a true bill the court may, *before conviction*, upon the application of the prosecutor, award restitution, the finding of a true bill being necessary to give the court jurisdiction to award restitution. It is entirely in the discretion of the court to grant or refuse a writ of restitution at this stage ; and they may sometimes require the case to be made out by affidavit (*a*). The Queen's Bench will not review their decision (*a*). The defendant can show by affidavit when the writ is prayed for that the prosecutor's interest has ceased ; or can, if the writ be granted, apply to have it quashed ; or, on giving indemnity to the sheriff, can get him to return upon the writ any special matter, in which case the prosecutor can either object to the return for insufficiency in law, or bring an action for a false return if the return is inaccurate in fact (*b*) ; or can allege for a stay of restitution that he has had occupation or quiet possession for three years together next before the day of such indictment. After indictment found.

N. S. 24 ; *Ex parte Fulder*, 8 Dowl. 535. (a) Bac. Abr., Forcible Entry (F) ; *R. v. Dillon*, 2 Chit. 314 ; *R. v. Harland*, 8 A. & E. 826 ; *R. v. Hake*, 4 M. & R. 483 ; Com. Dig., Forcible Entry (D 5).  
 (y) Hawk. P. C., I. c. 64, s. 8. *R. v. Layton*, 1 Salk. 353 ; *Rich. 2*, c. 2 ; 8 Hen. 6, c. 9, s. 6. (b) *R. v. Dillon*, 2 Chit. 314.

ment so found, and that his estate therein is not ended or determined. If the prosecutor traverse this last allegation the question must be tried, and if it be found against the defendant, the defendant must pay to the prosecutor such costs and damages as shall be assessed by the judges or justices before whom the same is tried, which can be recovered and levied in the same way as costs and damages in judgments upon other actions are recovered (*c*).

To whom  
restitution  
may be  
awarded.

Restitution upon indictment found may be awarded to freeholders, or to tenants for terms of years, tenants by copyhold, by elegit, and others (*d*).

Against  
whom.

An award of restitution will only be made where the person who forcibly entered or detained had actually ousted the prosecutor, and is himself in possession at the time the indictment is found (*e*). If a person who has a right to enter, enter by force, he may be indicted, notwithstanding his right, and restitution may be awarded (*f*).

Restitution  
after summary  
proceedings.

Justices cannot upon their own view of the force award restitution without an inquisition and verdict of a jury (*g*). The proper course to pursue is as follows: Where complaint is made to justices of a forcible entry and detainer, or of an unlawful entry and forcible detainer, the justice may, if necessary, remove the force and convict the offender (*h*); he should then issue a *præcept* directed to the sheriff of the county to summon and return a jury to inquire into the matter (*i*). A time and place for the hearing must be fixed, and notice given to the defendant and the other parties to appear before him (*k*). The complainant must prove a forcible entry and detainer

(*c*) 31 Eliz. c. 11.

50.

(*d*) 21 Jac. 1, c. 15; App. B, p. 294.

(*h*) *Ante*, p. 20.

(*i*) 8 Hen. 6, c. 9, ss. 3, 4.

(*e*) Anon., 3 Salk. 169.

(*k*) Hawk. P. C., I. c. 64, s. 60;

(*f*) Dalton, c. 182.

Bac. Abr., Forcible Entry (G).

(*g*) Hawk. P. C., I. c. 64, s.

or an unlawful entry and forcible detainer (*l*). The defendant can deny the force, or plead that his entry was peaceable and lawful (*m*), or that he or his ancestor has been in possession for three whole years together of a lawful estate (*n*), and that his estate therein is not ended or determined (*o*). The issues must then be tried by a jury and no award of restitution can be made until they have been tried (*p*). If the jury find in favour of the complainant, an inquisition should be drawn up and signed by each of them and by the justice, which must be kept by the justice unless the inquiry is moved by certiorari into the Queen's Bench Division. Upon the inquisition being found in favour of the complainant the justice is bound to grant restitution (*q*), and will at once put the complainant into possession, peaceably if possible, and make an indorsement on the inquisition of such possession having been delivered. The inquisition must set out the estate possessed by the complainant in the property in dispute (*r*). If possession cannot be obtained peaceably, a warrant should be directed to the sheriff to put the complainant in possession (*s*). The justice in all cases must indorse on the inquisition a memorandum of the writ of possession being granted and what has been done under it.

The justices, or any one of those who have awarded restitution, may themselves supersede the præcept for restitution before it is executed, if the indictment or inquisition appear to them to be insufficient (*t*). The Queen's

Supersedes  
of restitution.

By justices.

By Q. B. D.

(*l*) *R. v. Wilson*, 3 A. & E. 817; *R. v. Oakley*, 4 B. & Ad. 307.

(*m*) *Ante*, p. 19.

(*n*) 8 Hen. 6, c. 9, s. 6; Hawk. P. C., I. c. 64, s. 53; Bac. Abr., Forcible Entry (G).

(*o*) 8 Hen. 6, c. 9, s. 7.

(*p*) *R. v. Harris*, 1 Salk. 260; *R. v. Winter*, 2 Salk. 587.

(*q*) *R. v. Harland*, 8 A. & E. 826.

(*r*) *R. v. Bowser*, 8 Dowl. 128.

(*s*) Hawk. P. C., I. c. 64, s. 52.

(*t*) *Id.* ss. 61, 62.

Bench has always power to remove an indictment or inquisition by certiorari, and to supersede the restitution (*u*), or, upon quashing an indictment or inquisition, to set aside a writ of restitution which has been executed (*u*). A writ of restitution will be superseded and re-restitution granted when it appears that the justices have been irregular in their proceedings, as by refusing to try a traverse of the force tendered by the defendant (*x*), or if the defendant does traverse the force and gets a verdict (*y*). In the case of an indictment, a traverse of the force is an absolute supersedeas (*z*).

An inquisition as to the force used, which was to give effect to a conviction, will be quashed if the conviction is void (*a*), it will also be quashed if it does not appear what estate the party had on whom entry was made (*b*).

Re-restitution  
by Q. B. D.

Where the Queen's Bench has set aside a writ of restitution after it has been executed it will always award to the defendant re-restitution (*c*), even when the indictment or conviction or inquisition on which the restitution was granted is quashed (*d*), and that, too, without going into the merits (*e*).

The following are the statutes relating to the subject of forcible entry and forcible detainer (*f*): 5 Rich. 2, c. 8; 15 Rich. 2, c. 2; 4 Hen. 4, c. 8; 8 Hen. 6, c. 9; 31 Eliz. c. 11; 21 Jac. 1, c. 15.

(*u*) Hawk. P. C., I. c. 64, s. 63.

(*x*) *R. v. Winter*, 2 Salk. 587.

(*y*) Hawk. P. C., I. c. 64, s.

63.

(*z*) *R. v. Winter*, *supra*.

(*a*) *R. v. Wilson*, 3 A. & E.

817.

(*b*) *R. v. Dorney*, 12 Mod. 418.

(*c*) *R. v. Williams*, 9 B. & C.

549; *R. v. Wilson*, 3 A. & E.

817.

(*d*) *Ford's case*, Cro. Jac. 151;

*R. v. Jones*, 1 Str. 474.

(*e*) *R. v. Wilson*, *supra*.

(*f*) See App. B, pp. 291—294.

## CHAPTER V.

### BY LANDLORD AGAINST TENANT.

WHEN a landlord brings an action to recover possession of demised premises, he need not prove his title to the premises. It is sufficient for him to prove a tenancy, and its termination, and that the defendant is in possession under that tenancy. If the plaintiff himself did not let the defendant into possession, or actually demise to him, he must also show that the reversion is vested in him. The only other matter necessary to be proved, is that the premises sought to be recovered were included in the demise.

What landlord must prove.

A tenancy, according to its nature, may expire, or be determined by efflux of time, notice to quit, demand of possession, determination of will, forfeiture, disclaimer, or surrender.

Termination of tenancy.

A landlord may proceed under the practice established by the Judicature Acts, and the rules of the Supreme Court, or under the Common Law Procedure Act, if applicable to his case.

Procedure.

The fact that the defendant is a tenant can be shown by proof of a lease by deed or writing, or of an oral demise; that the defendant was let into possession by the plaintiff or his predecessors, and not under a conveyance of the freehold (a); by payment and receipt of rent; by an acknowledgment of title as landlord; or by admissions of

Proof of tenancy.

(a) *Doe v. Wiggins*, 4 Q. B. 367.

tenancy (b). The presumption of a tenancy raised by an acknowledgment, admission, or payment of rent may be rebutted by an explanation of the circumstances under which they were made (c).

If the defendant is not the original tenant, it may be proved by direct evidence that he came in as assignee or sub-lessee, or otherwise through or under the original tenant; if he came into possession after the original tenant, and during the continuance of the demise, he will be presumed, in the absence of proof to the contrary, to have obtained possession through or under the original tenant by assignment, sub-lease, or otherwise (d). If he has paid rent to, or otherwise acknowledged the title of the landlord, he will have estopped himself from denying that he is in possession as tenant (e).

Proof that  
plaintiff is  
reversioner.

If the plaintiff is not the original lessor, but claims through or under him, he must show that he is entitled to the reversion. This he can do by direct evidence of assignment, sub-lease, or any other title to the reversion. Payment of rent to the plaintiff by previous occupiers (f), and admissions by previous deceased occupiers (g), are *prima facie* evidence that the plaintiff is entitled to the reversion. If the defendant, or any person through or under whom he claims, has paid rent to, or acknowledged the title of the plaintiff, he is estopped from denying his

(b) *Howard v. Smith*, 3 M. & Gr. 254; *Slatterie v. Pooley*, 6 M. & W. 664.

(c) *Rogers v. Pitcher*, 6 Taunt. 202.

(d) *Doe v. Murless*, 6 M. & S. 110; *Doe v. Williams*, 6 B. & C. 41; *Roe v. Street*, 2 A. & E. 329, 331; *Doe v. Rickarby*, 5 Esp. 4; *Rees v. Perrott*, 4 C. & P. 230; *Doe v. Stacey*, 6 C. & P. 139;

*Williams v. Heales*, L. R. 9 C. P. 177.

(e) *Post*, pp. 29, 30.

(f) *Doe v. Stacey*, 6 C. & P. 139; *Doe v. Austin*, 9 Bing. 41; *Daintry v. Brocklehurst*, 3 Exch. 207.

(g) *Gery v. Redman*, 1 Q. B. D. 161; *De Bode's case*, 8 Q. B. 208; *Peaceable v. Watson*, 4 Taunt. 16.



title to the reversion, unless such payment or acknowledgment can be explained (*h*).

When the plaintiff has shown the existence of the relationship of landlord and tenant between himself and the defendant in any of the before-mentioned ways, the defendant is estopped from denying his title to the premises. It is a well-established rule or maxim of law that a tenant cannot dispute his landlord's title (*i*); it is his duty to defend his landlord's title; if he wishes to dispute it, he must give up possession (*k*). This is the rule, whether the demise is by deed, by writing, or by parol; whether for a term certain, or for any indefinite period, or at will, or at sufferance (*l*); and applies to a mere licensee or to a servant (*m*).

Tenant  
estopped from  
denying title  
of lessor.

A tenant is estopped from contending that the person who demised to him, or let him into possession, either actually or constructively, had not, at the time of the demise or letting into possession, any right or title to dispose of the possession (*n*). For instance, he cannot set up the defence that there was then an existing tenancy in another (*o*); or that the landlord was an undischarged bankrupt (*p*); or had mortgaged the premises

(*h*) *Post*, p. 30.

(*i*) Lit. s. 58; Co. Lit. 47 b; *Duchess of Kingston's case*, 2 Sm. L. C. 812 (ed. 9); *Doe v. Smythe*, 4 M. & S. 347; *Parker v. Manning*, 7 T. R. 537; *Wilkins v. Wingate*, 6 T. R. 62; *Delaney v. Fox*, 2 C. B. N. S. 768; *Gouldsworth v. Knights*, 11 M. & W. 337; *Cuthbertson v. Irving*, 6 H. & N. 135; *Dolby v. Isles*, 11 A. & E. 335; *Beckett v. Bradley*, 7 M. & Gr. 994; *Phipps v. Sculthorpe*, 1 B. & Ald. 50.

(*k*) *Doe v. Austin*, 9 Bing. 41, 45.

(*l*) *Agar v. Young*, Car. & M.

78; *Doe v. Skirrow*, 7 A. & E. 157; *Doe v. Foster*, 3 C. B. 215, 229; *Doe v. Burton*, 16 Q. B. 807. (*m*) *Doe v. Baytup*, 3 A. & E. 188; *Doe v. Birchmore*, 9 A. & E. 662.

(*n*) *Barwick v. Thompson*, 7 T. R. 488; *Ward v. Ryan*, Ir. R. 10 C. L. 17; *Francis v. Doe*, 4 M. & W. 331, 336.

(*o*) *Phipps v. Sculthorpe*, 1 B. & Ald. 50; *Doe v. Mizem*, 2 M. & Rob. 56; *Bringloe v. Goodson*, 4 B. N. C. 726.

(*p*) *Parker v. Manning*, 7 T. R.

and the mortgagee was entitled to possession (*q*). He cannot set up any supposed defect in his landlord's title (*r*), as that the presentation of an incumbent was simoniacal (*s*); that the assignment of a lease was void (*t*); that a lease from the Crown to the landlord was illegal (*u*); or that the lessors, who demised as trustees of two persons, were trustees of one only (*x*); or, when this was material in ejectment, that the lessor had only an equitable estate (*y*).

Defect of title  
apparent in  
lease.

A tenant is equally estopped, even if such defect appears upon the face of the lease itself (*z*).

Lease obtained  
by fraud.

Both landlord and tenant are estopped by a lease which has been obtained by fraud or misrepresentation, until proceedings have been taken under which it has been set aside (*a*).

Estoppel  
extends to all  
persons  
coming in  
after the  
lessee.

The rule that a tenant cannot dispute his landlord's title extends to all persons who claim, or obtain possession, through or under the original tenant, whether by assignment (*b*), sub-lease (*c*), or in any other way (*d*). They are

537; *Cook v. Whellock*, 24 Q. B. D. 658.

(*q*) *Alchorne v. Gomme*, 2 Bing. 54; *Doe v. Skirrow*, 7 A. & E. 157.

(*r*) *Driver v. Lawrence*, 2 W. Black. 1259; *Doe v. Ongley*, 10 C. B. 25.

(*s*) *Cooke v. Lozley*, 5 T. R. 4.

(*t*) *Wogan v. Doyle*, 12 L. R. Ir. 69.

(*u*) *Doe v. Abrahams*, 1 Stark. 305.

(*x*) *Fleming v. Gooding*, 10 Bing. 549.

(*y*) *Blake v. Foster*, 8 T. R. 487; *Doe v. Budden*, 5 B. & Ald. 626; *Rennie v. Robinson*, 1 Bing. 147.

(*z*) *Morton v. Woods*, L. R. 3

Q. B. 658; 4 *id.* 293; *Jolly v. Arbuthnott*, 28 L. J. Ch. 547; *Dancer v. Hastings*, 12 Moore, 34; *Duke v. Ashby*, 7 H. & N. 600. There are some earlier cases which seem to be to the contrary: — *Pargeter v. Harris*, 7 Q. B. 708; *Doe v. Goldsmith*, 2 C. & J. 674; *Greenaway v. Hart*, 14 C. B. 340; *Saunders v. Mereweather*, 3 H. & C. 902.

(*a*) *Feret v. Hill*, 15 C. B. 207.

(*b*) *Taylor v. Needham*, 2 Taunt. 278; *Johnson v. Mason*, 1 Esp. 89.

(*c*) *L. & N.-W. R. v. West*, L. R. 2 C. P. 553; *Doe v. Beckett*, 4 Q. B. 601; *Barwick v. Thompson*, 7 T. R. 488; *Doe v. Fuller*, Tyr. & Gr. 17.

(*d*) *Doe v. Austin*, 9 Bing. 41

respectively estopped in the same way and to the same extent as the original tenant himself would have been. This is the rule, even though any such person may have a good title of his own against the landlord; in that case he must first give up possession, and then assert his own title (*e*). A person who defends as landlord is estopped in the same manner and to the same extent as his tenant (*f*), and he is not estopped if his tenant is not estopped (*g*).

This estoppel continues as long as the original tenant, or any person claiming through or under him, remains in possession, even after the expiration of the term (*h*). It has, however, been held in one case that a person who having possession under a good title of his own, took a demise from, and paid rent to a stranger, was not estopped from setting up his own good title as a defence after the expiration of the term (*i*).

Continuance  
of the  
estoppel.

A tenant is just as much estopped in an action by a plaintiff claiming through or under the original lessor, as in an action by such lessor himself, from disputing the right and title of the lessor to demise (*k*). He is not, however, estopped from denying that the reversion is vested in the plaintiff, unless he has acknowledged the

Estoppel in  
favour of suc-  
cessors of  
lessor.

*Doe v. Skirrow*, 7 A. & E. 157;  
*Doe v. Budden*, 5 B. & Ald. 626;  
*Cooper v. Blandy*, 1 B. N. C. 45;  
*Doe v. Edgar*, 2 B. N. C. 498;  
*Doe v. Mills*, 2 A. & E. 17; *Doe*  
*v. Burton*, 9 C. & P. 254.

(*e*) *Doe v. Burton*, 9 C. & P.  
254.

(*f*) *Doe v. Smythe*, 4 M. & S.  
347; *Doe v. Mizem*, 2 M. &  
Rob. 56; *Doe v. Litherland*, 4  
A. & E. 784; *Doe v. Austin*, 9  
Bing. 41.

(*g*) *Doe v. Brown*, 7 A. & E.  
447; *Gregory v. Doidge*, 3 Bing.  
474.

(*h*) *Doe v. Austin*, 9 Bing. 41;  
*Clark v. Adie*, 2 App. Cas. 423,  
435, per Ld. Blackburn.

(*i*) *Accidental Soc. v. Mackenzie*,  
5 L. T. 20.

(*k*) *Cuthbertson v. Irving*, 6  
H. & N. 135; *Driver v. Law-  
rence*, 2 Wm. Black. 1259;  
*Taylor v. Needham*, 2 Taunt.  
278; *Doe v. Edgar*, 2 B.

plaintiff as his landlord (*l*). If the plaintiff claims as assignee, or as heir, or as devisee, executor or administrator, the defendant may dispute the assignment (*m*), the heirship (*n*), or that the reversion passed by the will; or he may prove that the executor had assented to a specific bequest of the reversion to another person (*p*).

Estoppel of tenant by attornment or acknowledgment.

Although a tenant is always estopped from denying the title of the person who actually demised to him or let him into possession, yet, when it is sought to establish the relationship of landlord and tenant from mere attornment or payment of rent, evidence is always admissible on the part of the tenant to explain such attornment or payment of rent, and to show that it was made in consequence of a mistake (*q*), or of a misrepresentation (*r*), and that he was not aware of the defect in the title of the person to whom he attorned or paid rent. The payment of rent, as a general rule, raises a presumption that the person receiving it has a good title, which may, however, be rebutted (*s*).

Reversion by estoppel.

A reversion by estoppel is a legal estate which will

N. C. 498; *Doe v. Fuller*, Tyr. & Gr. 17; *Ward v. Ryan*, Ir. Rep. 10 C. L. 17.

(*l*) *Doe v. Burton*, 16 Q. B. 807; *Doe v. Wiggins*, 4 Q. B. 367; *Doe v. Austin*, 9 Bing. 41; *Cooper v. Blandy*, 1 B. N. C. 45; *Cooke v. Loxley*, 5 T. R. 4; *Hall v. Butler*, 10 A. & E. 204; *Doe v. Mitchell*, 1 B. & B. 11.

(*m*) *Rennie v. Robinson*, 1 Bing. 147.

(*n*) *Doe v. Seaton*, 2 C. M. & R. 728.

(*p*) *Mason v. Farnell*, 12 M. &

W. 674; *Doe v. Harris*, 16 M. & W. 517, 520.

(*q*) *Rogers v. Pitcher*, 6 Taunt. 202; *Cornish v. Searell*, 8 B. & C. 471; *Gregory v. Doidge*, 3 Bing. 474; *Doe v. Francis*, 2 M. & Rob. 57; *Knight v. Cox*, 18 C. B. 645; *Cooper v. Blandy*, 1 B. N. C. 45.

(*r*) *Gravenor v. Woodhouse*, 2 Bing. 71; *Doe v. Brown*, 7 A. & E. 447.

(*s*) *Fenner v. Duplock*, 2 Bing. 10.

continue during the tenancy, and may be assigned or transmitted in any legal way (*t*).

In some exceptional cases a defendant who has been let into possession by the plaintiff, or has occupied the position of tenant to him, is not estopped from denying the plaintiff's title, for instance, if he has been let into possession under a lease which the plaintiff had no power to grant, and which is void, unless he has paid rent or done some other act acknowledging him as landlord (*u*). A person who has taken a conveyance of a freehold subject to a void lease is not estopped from ejecting the tenant under such lease as a trespasser (*x*).

Exceptions to rule as to estoppel.

Though a tenant is estopped from disputing his landlord's right to demise or title to the reversion, he is not estopped from proving that the title of his landlord has expired, or has been merged or extinguished (*y*) since the date of the demise. He may show that his landlord was only a tenant for a term of years which has expired (*z*); or that the original lessor was tenant for life and is dead (*a*); or that his landlord was tenant *pur autre vie*, and that the *cestui que vie* is dead (*b*); or that his landlord was a tenant from year to year, or at will, or on sufferance, and that such tenancy has been determined (*c*); or that his landlord was a mortgagor in possession, and that

Tenant may show expiration of landlord's title.

(*t*) *Doe v. Edwards*, 5 B. & Ad. 816; *Neave v. Moss*, 1 Bing. 1065; *Outhbertson v. Irving*, 6 H. & N. 135. 360.

(*u*) *Magdalen Hospital v. Knott*, 4 App. Cas. 324. (*b*) *Blake v. Foster*, 8 T. R. 487; *Roe v. Ramsbotham*, 3 M. & S. 516; *Fenner v. Duplock*, 2

(*x*) *Smith v. Widdlake*, 3 C. P. D. 10. Bing. 10; *Hill v. Saunders*, 4 B. & C. 529.

(*y*) *Webb v. Russell*, 3 T. R. 393. (*c*) *Hopcraft v. Keys*, 9 Bing. 613; *Mountnoy v. Collier*, 1 E. & B. 630; *Brook v. Biggs*, 2 B. N. C. 572.

(*z*) *England v. Slade*, 4 T. R. 682; *Neave v. Moss*, 1 Bing. 360.

(*a*) *Weld v. Baxter*, 11 Exch.

the mortgagee has entered into possession and demanded the rent (*d*); or that the plaintiff has parted with his reversion by sale, mortgage, or otherwise (*e*); or has become bankrupt, and that the reversion has vested in his trustee (*f*). The tenant may prove that he has been evicted by title paramount, for that shows that the landlord's title has expired; the eviction must be actual and genuine, and without any collusion with the person who has evicted (*g*).

Eviction by  
title para-  
mount.

If the plaintiff had a good title at the date of the writ, which has, however, expired before the trial, the defendant is estopped from setting up such expiration as a bar to the issue of a writ of possession (*h*); unless the defendant prove affirmatively that it would be futile to issue such a writ because someone else, and not the plaintiff, has a right to the possession (*i*).

Expiration  
of landlord's  
title after  
action begun.

If, however, the tenant has, after the expiration of the landlord's title, with knowledge of that fact, paid rent to him or otherwise acknowledged his title, he is estopped from showing that his title has expired (*k*); but he is not thereby estopped if he was ignorant of such expiration, or has been misled by his landlord on that point (*l*).

Estoppel  
when tenant  
acknowledges  
landlord's  
title after  
expiration.

As between landlord and tenant the estoppel must be

Estoppel o.  
landlord.

(*d*) *Doe v. Barton*, 11 A. & E. 307; but see *Delaney v. Fox*, 2 C. B. N. S. 768.

(*e*) *Doe v. Watson*, 2 Stark. 230; *Doe v. Edwards*, 5 B. & Ad. 1065; *Agar v. Young*, Car. & M. 78.

(*f*) *Doe v. Andrews*, 4 Bing. 348.

(*g*) *Delaney v. Fox*, 2 C. B. N. S. 768; *Poole v. Whitt*, 15 M. & W. 571. As to what amounts to an eviction, see *post*, p. 233.

(*h*) *Gibbins v. Buckland*, 1 H. & C. 736; *Buckland v. Gibbins*, 32 L. J. Ch. 391; *Knight v. Clarke*, 15 Q. B. D. 294.

(*i*) *Knight v. Clarke*, *supra*. See pp. 266, 278.

(*k*) *L. & N.-W. Rlwy. v. West*, L. R. 2 C. P. 553.

(*l*) *Claridge v. Mackenzie*, 4 M. & Gr. 143; *Fenner v. Duplock*, 2 Bing. 10; *Doe v. Barton*, 11 A. & E. 307.

mutual ; if the landlord is not estopped, neither is the tenant (*m*). The lessor (*n*), and all persons claiming through or under him (*o*), are estopped during the continuance of the demise from denying that he had any estate in the land, or that he had a right to dispose of the possession (*p*). A landlord is estopped from claiming to treat as his own tenant a person whom he has required to enter into that relationship with another instead of himself (*q*).

A tenant is estopped from denying the title of his landlord to all the premises comprised in the demise, but he is not estopped from showing that the land sought to be recovered, or any part thereof, was never comprised in the demise at all (*r*).

In respect of what premises estoppel operates.

All encroachments made by a tenant during the continuance of his tenancy, upon adjoining waste or land of a stranger or of the landlord himself, are presumed to have been made on behalf of the landlord, and to have been held as part of the demised premises, and the tenant is estopped from setting up any title to such encroachments adverse to the title of his landlord (*s*). To raise this presumption it is not necessary that the encroached land should be contiguous or adjoining to, in the sense of continuous with, the land held by the tenant under the

Encroachments by tenant.

(*m*) *Howe v. Scarrott*, 4 H. & N. 723.

(*n*) *Darlington v. Pritchard*, 4 M. & Gr. 783.

(*o*) *Sturgeon v. Wingfield*, 15 M. & W. 224 ; *Trevivan v. Lawrence*, 1 Salk. 276 ; *Goodtitle v. Morse*, 3 T. R. 365, 371.

(*p*) *Doe v. Oliver*, 5 M. & Ry. 202 ; *Doe v. Thompson*, 9 Q. B. 1037, 1043 ; *Right v. Bucknell*, 2 B. & Ad. 278 ; see II. Smith's

L. C. 803 (9th ed.).

(*q*) *Downs v. Cooper*, 2 Q. B. 256.

(*r*) *Doe v. Burt*, 1 T. R. 70 ; *Clark v. Adie*, 2 App. Cas. 423, 435, per Ld. Blackburn.

(*s*) *Doe v. Jones*, 15 M. & W. 580 ; *Andrews v. Hailes*, 2 E. & B. 349 ; *Doe v. Tidbury*, 14 C. B. 304 ; *Lisburne v. Davies*, L. R. 1 C. P. 259 ; *Whitmore v. Humphries*, L. R. 7 C. P. 1.

demise ; it is enough if it be so near thereto that it may be presumed that the position of the tenant, as such, enabled him to take it (*t*). This presumption is equally strong although the landlord has known of, and assented to, an encroachment upon his own land (*u*). This presumption, however, is one of fact in all cases, and may be rebutted by clear evidence that at the time of making the encroachment the tenant intended to make it as his own (*x*). No such presumption will be made against a person who, having made an encroachment, has subsequently become tenant of adjoining lands though they belong to the true owner of the encroachment ; he will not be presumed to have held such encroachment as part of the subsequently demised land, or as tenant (*y*).

(*t*) *Lisburne v. Davies*, L. R. 1 last notes, and *Doe v. Rees*, 6 C. C. P. 259. & P. 610.

(*u*) *Whitmore v. Humphries*, L. R. 7 C. P. 1. (*y*) *Dixon v. Baty*, L. R. 1 Ex. 259 ; *Berney v. Bickmore*, 8 L. T. 353.

(*x*) See the cases in the three



## CHAPTER VI.

### TERMINATION OF TENANCY.

- |                                     |                           |
|-------------------------------------|---------------------------|
| 1. <i>Notice to Quit</i> , 35       | 4. <i>Surrender</i> , 50  |
| 2. <i>Demand of Possession</i> , 47 | 5. <i>Disclaimer</i> , 51 |
| 3. <i>Efflux of Time</i> , 49       |                           |

#### 1. *Notice to Quit.*

A NOTICE to quit is a certain reasonable notice required by law, by custom, or by special agreement, to enable either a landlord or a tenant, without the consent of the other, to determine certain tenancies. Tenancies, which require a notice to quit to determine them, would never determine unless such notice was given, but would pass to the representatives on the death (*a*), or bankruptcy (*b*), of landlord or tenant.

Where there is any express agreement as to the notice to be given by either party in order to determine the tenancy, such notice must be given and will be sufficient (*c*); the terms of the agreement as to notice must be strictly complied with (*d*). The length of such notice, and the time at which it must expire, will depend upon the terms

Nature of a notice to quit.

Agreement as to notice to quit.

(*a*) *Birch v. Wright*, 1 T. R. 241; *Doe v. Raffan*, 6 Esp. 4; 378; *Maddon v. White*, 2 T. R. 314; *Bridges v. Potts*, 17 C. B. N. S. 159; *Doe v. Wood*, 14 M. & W. 682.

(*b*) *Doe v. Ridout*, 5 Taunt. & E. 720; *Hogg v. Brooks*, 14 Q. B. D. 256; *Quartermains v. Selby*, 5 Times Rep. 223.

(*c*) *Doe v. Baker*, 8 Taunt.

475

of the agreement (*e*); if the agreement is silent upon those points, they will depend upon the common law or custom (*f*).

"Months." If it is agreed that the tenancy may be determined by "six months' notice to quit, the word "months" means lunar months, in the absence of evidence that the parties meant calendar months (*g*).

Notice to quit by common law. Where a tenancy from year to year is created by express agreement, or arises by implication of law, and there is no special stipulation or local custom or statute law providing for the determination of the tenancy, the notice to quit required by law is half a year's notice, expiring at the end of the first or some other year of the tenancy (*h*). Such notice must be a full half-year's notice, and six months' notice may not be sufficient (*i*).

Half-year's notice.

Agricultural Holdings Act, 1883.

One year's notice.

By the Agricultural Holdings Act, 1883 (*k*), in the case of tenancies to which the Act applies (*l*), where a half-year's notice (*m*) expiring with a year of tenancy is by law (*n*) necessary and sufficient to determine a tenancy from year to year, one year's notice so expiring is now necessary and sufficient (*k*). Unless the landlord and tenant in writing

(*e*) *Doe v. Donovan*, 2 Camp. 159; *Johnstone v. Huddleston*, 4 B. & C. 922, 932; *Doe v. Smaridge*, 7 Q. B. 957; *Barlow v. Teal*, 15 Q. B. D. 403, 501.

(*f*) *Barlow v. Teal*, *supra*.

(*g*) S. 33, Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61). See App. B, p. 367.

(*h*) S. 54. See App. B, p. 368.

(*i*) *Wilkinson v. Calvert*, 3 C. P. D. 360; *Morgan v. Davies*, 3 C. P. D. 260.

(*n*) *Barlow v. Teal*, 15 Q. B. D. 403, 501.

(*h*) *Right v. Darby*, 1 T. R.

agree that this section shall not apply (*o*), or the tenant is adjudged a bankrupt (*o*). The section only applies where there is no express stipulation (*p*) or local custom as to the termination of the tenancy, and does not apply where there is any such express stipulation or local custom (*p*).

Where there is a local custom regulating notices to quit, Custom. in the neighbourhood, such custom will be deemed to be a term of the tenancy, and the customary notice must therefore be given, unless the custom has been expressly excluded (*q*).

In the case of periodical tenancies, other than yearly tenancies, if there is any agreement as to notice to quit, notice must be given in accordance with the terms of the agreement. It does not yet seem to have been definitely decided that there is any implied term in such tenancies that a particular length of notice, such as a quarter's, month's, or week's notice, should be given (*r*). With respect to a weekly tenancy, contrary opinions seem to have been expressed, but the better opinion seems to be that, at any rate, a reasonable notice should be given (*r*). With regard to a monthly tenancy, it has been decided in Ireland that a month's notice is necessary (*s*). A custom with regard to notice to quit in any of the above cases may be proved, and the customary notice will be necessary and sufficient. Weekly, monthly, and quarterly tenancies.

The notice to quit must be to determine the tenancy at the proper time (*t*), and such proper time is, as To quit at what time.

(*o*) S. 33.

(*p*) *Barlow v. Teal*, 15 Q. B. D. 501.

(*q*) *Tyley v. Seed*, Skin. 649; *Roe v. Charnock*, 1 Peake, 4; *Wilkins v. Wood*, 17 L. J. Q. B. 319.

(*r*) *Doe v. Raffan*, 6 Esp. 4; *Doe v. Hazell*, 1 Esp. 94; *Jones v. Mills*, 10 C. B. N. S. 788, 796;

*Cornish v. Stubbs*, L. R. 5 C. P. 334; *Sandford v. Clarke*, 21 Q. B. D. 398; *Bowen v. Anderson*, [1894] 1 Q. B. 164.

(*s*) *Beamish v. Cox*, 16 L. R. 1r. 270, 458.

(*t*) *Doe v. Samuel*, 5 Esp. 173; *Doe v. Lea*, 11 East, 312; *Doe v. Milward*, 3 M. & W. 328.

a general rule, ascertained by reference to the commencement of the tenancy (*u*), unless there be an express agreement as to the time at which the tenancy may be determined (*x*).

Commence-  
ment of  
tenancy.

The tenancy, *primâ facie*, commences on the actual day of the demise or entry (*y*); but if the tenant has paid, or agreed to pay, rent quarterly or half-yearly, the tenancy *primâ facie* commences, for the purpose of giving a notice to quit, at the beginning of the first quarter or half-year for which rent is paid or agreed to be paid, although the entry or demise was in fact on some earlier or later day (*z*). In the case of a tenant holding over and becoming yearly tenant, if the time of year when the original tenancy commenced is different from the time at which it ended, the notice to quit must *primâ facie* be given with reference to the former time (*a*). In the cases of an assignee (*b*) or sub-lessee (*c*) so holding over, it has been held that the notice to quit must be given with reference to the time when the original tenancy ended.

Alternative  
times for  
quitting.

When the date of the commencement of the tenancy is uncertain, a notice to quit is good which gives alternative times for quitting (*d*). A notice to quit at the expiration of the current year of the tenancy which shall expire next

(*u*) *Doe v. Matthews*, 11 C. B. 675; *Berrey v. Lindley*, 3 M. & Gr. 498, 511; *Mills v. Goff*, 14 M. & W. 72; *Kelly v. Patterson*, 43 L. J. C. P. 320.

(*x*) *Doe v. Grafton*, 18 Q. B. 496.

(*y*) *Doe v. Matthews*, 11 C. B. 675; *Sandill v. Franklin*, L. R. 10 C. P. 377.

(*z*) *Doe v. Johnson*, 6 Esp. 10; *Doe v. Stapleton*, 3 C. & P. 275; *Doe v. Grafton*, 18 Q. B. 496; *sandill v. Franklin*, *supra*.

(*a*) *Doe v. Dobell*, 1 Q. B. 806; *Berrey v. Lindley*, 3 M. & Gr. 498; *Kelly v. Patterson*, L. R. 9 C. P. 681.

(*b*) *Doe v. Lines*, 11 Q. B. 402.

(*c*) *Kelly v. Patterson*, *supra*.

(*d*) *Hirst v. Horn*, 6 M. & W. 393; *Doe v. Smith*, 5 A. & E. 350; *Doe v. Wrightman*, 4 Esp. 5; *Mills v. Goff*, 14 M. & W. 72; *Doe v. Morphett*, 7 Q. B. 577; *Ashtown v. Larke*, 6 Ir. R. C. L. 270.

after the requisite length of notice has expired, will be sufficient without specifying any particular day (*e*).

A notice to quit upon a particular day is not evidence that the tenancy commenced upon that day (*f*), unless, perhaps, the notice is served personally upon the tenant and is not objected to (*g*).

When different parts of the demised premises were entered upon at different times, a notice to quit given in time to determine the tenancy of the principal part will determine the tenancy of the whole (*h*), and it is a question of fact what is the principal part (*i*).

Premises entered upon at different times.

If a yearly tenancy commenced on a customary feast day, then the customary half-year's notice from one feast day to the feast day next but one following will be sufficient though less than half-a-year (*j*). If the notice is given to quit on a feast day, without specifying whether old or new style, and that feast day falls upon different days according to the old and the new style, such notice is good for whichever of those days is the day upon which the tenancy commenced (*k*). A "feast day" *prima facie* means a feast day according to the new style (*l*). If, however, the demise is in writing, but not under seal, and describes the tenancy as commencing on a feast day without stating whether old or new style, evidence may be

Feast days.

(*e*) *Doe v. Butler*, 2 Esp. 589 ; 498 ; *Doe v. Hughes*, 7 M. & W. 139.  
*Doe v. Woombwell*, 2 Camp. 559 ;

*Doe v. Timothy*, 2 C. & K. 351.

(*f*) *Doe v. Calvert*, 2 Camp. 387 ; *Walker v. Gode*, 6 H. & N. 594 ; *Doe v. Biggs*, 2 Taunt. 109.

(*g*) *Doe v. Forster*, 13 East, 405 ; *Thomas v. Thomas*, 2 Camp. 647.

(*h*) *Doe v. Spence*, 6 East, 120 ; *Doe v. Watkins*, 7 East, 551.

(*i*) *Doe v. Howard*, 11 East,

(*j*) *Roe v. Doe*, 6 Bing. 574 ; *Doe v. Green*, 4 Esp. 198 ; *Howard v. Wemsley*, 6 Esp. 53 ; *Morgan v. Davies*, 3 C. P. D. 260.

(*k*) *Doe v. Vince*, 2 Camp. 257 ; *Doe v. Perrin*, 9 C. & P. 467 ; *Denn v. Walker*, 2 Peake, 194 ; *Furley v. Wood*, 1 Esp. 198.

(*l*) *Doe v. Vince*, *supra*.

given to show that a feast day according to the old style was meant (*m*). If the agreement is under seal, such evidence is not admissible (*n*).

By whom  
notice may  
be given.

In the absence of any special agreement a notice to quit may be given either by the landlord or the tenant (*o*) for the time being (*p*), or by the authorized agent of either party (*q*). Whether a person has authority to give notice as agent is a question of fact to be determined in each case (*r*). An agent's authority must exist at the time the notice to quit is given, or at least when the time mentioned in the notice begins to run (*s*): a subsequent recognition by the landlord will not make the notice valid (*s*). An agent of an agent has no authority to give a notice to quit (*t*). An agent with general authority may give notice in his own name, but an agent with a special or limited authority must give notice in the name of the landlord (*u*).

Notice by  
mortgagee or  
mortgagor.

With reference to tenancies existing at the time of the execution of a mortgage, the mortgagee is in the position of an assignee of the reversion, and he may determine

(*m*) *Furley v. Wood*, *supra*; *Doe v. Benson*, 4 B. & Ald. 588; *Doe v. Lea*, 11 East, 312; *Smith v. Walton*, 8 Bing. 235; *Den v. Hopkinson*, 3 D. & R. 507.

(*n*) *Doe v. Benson*, *supra*; *Doe v. Lea*, *supra*.

(*o*) *Doe v. Browne*, 8 East, 165; *Miles v. Murphy*, Ir. Rep. 5 C. L. 382.

(*p*) *Doe v. Terry*, 4 A. & E. 274; *Doe v. Forwood*, 3 Q. B. 627.

(*q*) *Jones v. Phipps*, L. R. 3 Q. B. 567; *Erne v. Armstrong*, 20 W. R. 370.

(*r*) *Jones v. Phipps*, L. R. 3 Q.

B. 567. See *Doe v. Read*, 12 East, 57; *Doe v. Mixem*, 2 Moo. & Rob. 56; *Wilkinson v. Colley*, 5 Burr. 2694.

(*s*) *Doe v. Walters*, 10 B. & C. 626; *Doe v. Goldwin*, 2 Q. B. 143; *Right v. Cuthell*, 5 East, 491. The case of *Goodtitle v. Woodward*, 3 B. & Ald. 689, which is to the contrary, was not followed in the latter cases.

(*t*) *Doe v. Robinson*, 3 B. N. C. 677.

(*u*) *Jones v. Phipps*, L. R. 3 Q. B. 567; *Erne v. Armstrong*, 20 W. R. 370; *Stackpoole v. Parkinson*, 8 Ir. R. C. L. 561.

such tenancies by a notice to quit (*x*). If, however, by the terms of the mortgage, there is a re-demise to the mortgagor, the mortgagor may give the notice to quit in his own name (*y*). The mortgagor may have authority to give notices to quit as agent for the mortgagee in the same way as any other agent (*z*). The mere fact that the mortgagor is allowed to receive the rents from the tenants does not give him authority to give notices to quit in his own name (*a*).

Notice to quit by one of several joint lessors or lessees is sufficient to terminate the tenancy as to all (*b*). A notice to quit may be given by one of several tenants in common to his lessee to quit his undivided share (*c*).

By joint lessors or lessees.  
Tenants in common.

By the statute of 59 Geo. III. c. 12, all real property belonging to a parish is vested in the churchwardens and overseers in succession, and they may give notices to quit, or avail themselves of notices given by their predecessors (*d*). This statute does not apply to copyholds (*e*).

Notice by churchwardens and overseers.

Appointees, assignees of the property, or successors in title, may avail themselves of notices given by their predecessors (*f*).

A notice to quit by a landlord must be given to his immediate tenant for the time being or his agent, and not to an undertenant (*g*). A person in actual possession of

To whom notice must be given; by landlord.

(*x*) *Post*, p. 133.

(*y*) *Doe v. Goldwin*, 2 Q. B. 143; *post*, pp. 130, 131.

(*z*) *Ante*, p. 40.

(*a*) *Miles v. Murphy*, Ir. Rep. 5 C. L. 382.

(*b*) *Doe v. Summersett*, 1 B. & Ad. 135; *Doe v. Hughes*, 7 M. & W. 139; *Doe v. Chaplin*, 3 Taunt. 120.

(*c*) *Cutting v. Derby*, 2 W. Black. 1075; *Doe v. Gardiner*,

12 C. B. 319.

(*d*) *Hogg v. Norris*, 2 F. & F. 246; *Hunt v. Allgood*, 4 L. T. 215; *Doe v. Terry*, 4 A. & E. 274; *Doe v. Cockell*, 4 A. & E. 478; *post*, p. 180.

(*e*) *Doe v. Foster*, 3 C. B. 215.

(*f*) *Doe v. Forwood*, 3 Q. B. 627; *Doe v. Terry*, 4 A. & E. 274; *Doe v. Cockell*, *supra*.

(*g*) *Pleasant v. Benson*, 14 East, 234.

the demised premises is presumed to be the tenant, by assignment or otherwise, and notice to quit can be given to such person and will be effectual, unless the presumption is rebutted (*h*).

by tenant.

Notice to quit by a tenant must be given to his immediate landlord for the time being or his agent (*i*).

To joint tenants and tenants in common.

Notice to quit can be given to one of two or more joint tenants and will terminate the tenancy of all; but if given to one of several tenants in common, it is only a notice to quit his undivided share (*k*).

To a corporation.

In the case of a corporation, a notice to quit should be addressed to the corporation, but served upon its officers (*l*).

Service of notice.

A notice to quit is properly served if it be delivered to the tenant personally, or is proved to have come to his hands or to his knowledge (*m*). It is properly served if it be delivered to a servant or other agent of the tenant at his dwelling-house upon the demised premises (*n*), or at his dwelling-house off the demised premises (*o*); in the latter case it may be necessary to explain the nature of the notice when it is so delivered (*o*). It is not sufficient simply to leave the notice at the tenant's house, if not left with a servant or other agent, unless it has reached the tenant's hands or come to his knowledge (*p*). A notice to quit may be served upon a general agent of the

Upon servant

or other agent.

(*h*) *Rees v. Perrot*, 4 C. & P. 230; *Doe v. Williams*, 9 D. & R. 30; *Jones v. Murphy*, 2 J. & S. 223; *Sweeney v. Sweeney*, 10 Ir. Rep. C. L. 375.

(*i*) *Papillon v. Brunton*, 5 H. & N. 518.

(*k*) *Doe v. Crick*, 5 Esp. 196.

(*l*) *Doe v. Woodman*, 8 East, 228.

(*m*) *Doe v. Wrightman*, 4 Esp.

5; *Alford v. Vickery*, Car. & Mar. 280; *Doe v. Mitchell*, 1 Jur. 795.

(*n*) *Tanham v. Nicholson*, L. R. 5 H. L. 561.

(*o*) *Jones v. Marsh*, 4 T. R. 464.

(*p*) *Doe v. Lucas*, 5 Esp. 153; *Alford v. Vickery*, Car. & Mar. 280.



landlord for the management of the property (*q*), but not upon a mere collector of rents (*r*). It may be served upon the officers of a corporation (*s*), on the secretary, or at the principal office of a company, or if there be no secretary, upon a director (*t*). The service upon a person, who is constituted an agent to receive any document which may be left at a house, is good, whether such agent has communicated the fact of such service to his master or not (*u*).

Notice to quit may be sent by post. The notice, if posted, is presumed to have arrived in the ordinary course of post at the place to which it was directed (*x*). Service by post.

Notice to quit may be served at any time of the day, and on Sunday (*y*). At any time.

If the lease or agreement specifies the mode of service, the terms of the lease or agreement as to service must be strictly complied with (*z*). Agreed mode of service.

A notice to quit, under the Agricultural Holdings Act, 1883 (*a*), may be served on a person personally or by leaving it for him at his last known abode in England, or by a registered letter addressed to him there. If sent by post, it is to be deemed to have been served at the time when the letter would be delivered in ordinary course. Such service can be proved by proof that the letter was properly addressed and posted containing the notice (*a*). Service under Agricultural Holdings Act, 1883.

(*q*) *Papillon v. Brunton*, 5 H. & N. 518; *Quartermaine v. Selby*, 5 Times Rep. 223.

(*r*) *Pearse v. Boulter*, 2 F. & F. 133.

(*s*) *Doe v. Woodman*, 8 East, 228.

(*t*) 8 & 9 Vict. c. 18, s. 134, Lands Clauses Consolidation Act 1845; 8 & 9 Vict. c. 16, s. 135, Companies Act, 1845; *Garton v. G. W. R., E. B. & E.* 837.

(*u*) *Tanham v. Nicholson*, L. R. 5 H. L. 561, 568.

(*x*) *Papillon v. Brunton*, 5 H. & N. 521; *Gresham Co. v. Rossa Co.*, W. N. 1870, p. 119.

(*y*) *Sangster v. Noy*, 16 L. T. 157.

(*z*) *Hogg v. Brooks*, 15 Q. B. D. 256.

(*a*) 46 & 47 Vict. c. 61, s. 28. See App. B, p. 366.

Form of  
notice.

Verbal.

Not qualified  
or optional.

Must be to  
quit *all* the  
premises.

Exceptions.

Misdescrip-  
tion in  
notice ;

A parol notice to quit is sufficient, but it is usual for it to be in writing (*b*). The form in which a notice to quit is given is not material, but it must be clear and unambiguous, and such a notice that the person to whom it is given can safely act upon it at the time when it is given, and it must not be qualified or optional (*c*). It is not made ineffectual because it is accompanied with an offer of a new tenancy, even if such offer is written upon the same piece of paper, but in a separate and distinct paragraph (*d*). A notice to quit need not be directed to the tenant if it is delivered to him (*e*).

As a general rule, a notice to quit must be a notice to quit all the premises held under the same demise (*f*). By the Agricultural Holdings Act, 1883 (*g*), power is given to the landlord to re-take part only of the land with a view to using it for any of the purposes mentioned in the Act (*h*). Under such circumstances the landlord can give a notice to quit part only of the holding, but the tenant may, within twenty-eight days after service of the notice to quit, serve upon the landlord a notice in writing that he accepts the same as a notice to quit the entire holding, to take effect at end of the current year of the tenancy (*h*).

A misdescription of the premises, or of the tenant, or an obvious error in the notice, is not fatal if the tenant be

(*b*) *Doe v. Crick*, 5 Esp. 196 ;  
*Timmins v. Rowlinson*, 3 Burr.  
1603 ; *Bird v. Defonvielle*, 2 C. &  
K. 415, 420.

(*c*) *Doe v. Goldwin*, 2 Q. B.  
143 ; *Doe v. Jackson*, 1 Doug.  
175 ; *Ahearn v. Bellman*, 4 Ex.  
Div. 201, 205 ; *Jones v. Phipps*,  
L. R. 3 Q. B. 567, 573 ; *Gardner*  
*v. Ingram*, 61 L. T. 729.

(*d*) *Doe v. Jackson*, *supra* ;

*Ahearn v. Bellman*, *supra*.

(*e*) *Doe v. Wrightman*, 4 Esp. 5.

(*f*) *Doe v. Archer*, 14 East,  
245 ; *Right v. Outhell*, 5 East,  
491 ; *Doe v. Church*, 3 Camp.  
71 ; *Prince v. Evans*, 29 L. T.  
835.

(*g*) 46 & 47 Vict. c. 61.

(*h*) S. 41. See App. B, p.  
367.

not misled by it (*i*). And in any case a misdescription can be waived (*k*). The fact that the names of unnecessary persons appear in the notice will not render it invalid, if it is otherwise good (*l*); nor will the fact that it does not state to whom the premises are to be given up (*l*). A defect in a notice to quit may be waived, and the question of waiver is one of fact (*m*).

A notice to quit, at its expiration, terminates the tenancy absolutely. The landlord and tenant may, however, expressly or impliedly agree to waive their rights to resume or give up possession under such notice. If they do so, a new tenancy is created (*n*). Whether or not a notice to quit has been waived and a new tenancy created is a question of fact (*o*); such an agreement may be implied from payment, or acceptance, or demand, of rent accruing due since the expiration of the notice to quit (*p*); or from a distress (*q*) for such rent, unless the tenant replevies in which case he repudiates the tenancy (*r*); or from a second notice to quit being given (*s*); but such an agreement will not be implied from a mere holding over (*t*), or accidental

or omissions.

Effect of notice.

Waiver.

Creation of new tenancy.

(*i*) *Doe v. Roe*, 4 Esp. 185;  
*Doe v. Kightley*, 7 T. R. 63;  
*Doe v. Wilkinson*, 12 A. & E.  
743; *Doe v. Smith*, 5 A. & E. 350.

(*k*) *Doe v. Spiller*, 6 Esp. 70.

(*l*) *Doe v. Foster*, 3 C. B. 215.

(*m*) *Oakapple v. Copous*, 4 T.  
R. 361.

(*n*) *Tayleur v. Wildin*, L. R.  
3 Ex. 303. In *Inchiquin v. Lyons*, 20 L. R. Ir. 474, the Court of Appeal in Ireland disagreed with the law, as laid down in *Tayleur v. Wildin*, that a new tenancy was created by a waiver of a notice to quit before its expiration.

(*o*) *Blyth v. Dennett*, 13 C. B.  
178; *Doe v. Batten*, 1 Cowp.  
243; *Vance v. Vance*, 5 Ir. Rep.  
C. L. 363.

(*p*) *Doe v. Batten*, *supra*;  
*Blyth v. Dennett*, *supra*; *Good-  
right v. Cordwint*, 6 T. R. 219;  
*Doe v. Calvert*, 2 Camp. 387.

(*q*) *Zouch v. Willingdale*, 1 H.  
Bl. 311.

(*r*) *Blyth v. Dennett*, *supra*.

(*s*) *Doe v. Palmer*, 16 East, 53;  
*Doe v. Humphreys*, 2 East, 237;  
*Doe v. Inglis*, 3 Taunt. 54; *Doe  
v. Steel*, 3 Camp. 115, 117.

(*t*) *Jenner v. Clegg*, 1 M. &  
Rob. 213.

retention of the key (*u*), by the tenant, or from payment or acceptance of double value under the statute 4 Geo. 2, c. 28 (*x*).

Tenants of  
mortgagor.

A tenant is not entitled to notice to quit from a person who claims by title paramount to the title of his lessor (*y*), and, therefore, the tenants of a mortgagor whose tenancies have commenced since the date of the mortgage are not entitled to notice to quit from the mortgagee, unless the provisions of the Conveyancing Act, 1881 (*z*), or of certain other statutes, apply (*a*), or unless a new tenancy has been created between them and the mortgagee (*b*).

When notice  
to quit is  
unnecessary.

A notice to quit is unnecessary when the demise is for a term certain (*c*), or is to determine under certain circumstances or upon a certain event (*d*); when it is a term of the tenancy, or the landlord and tenant have expressly or impliedly agreed, that notice shall be unnecessary (*e*); or when a tenant holds over until the expiration of the current year of his tenancy, after his tenancy has been determined by the determination or cesser of his landlord's estate (*f*); it is unnecessary in the case of a tenant at will (*g*), of a tenant on sufferance (*h*), or of a licensee, though his licence must be revoked (*i*), or of a mortgagor in possession after the time fixed for repayment has expired (*k*).

(*u*) *Gray v. Bompas*, 11 C. B. N. S. 520.

(*x*) *Soulsby v. Neving*, 9 East, 310.

(*y*) *Doe v. Hilder*, 2 B. & Ald. 782.

(*z*) *Post*, p. 135.

(*a*) *Post*, p. 136.

(*b*) *Post*, p. 134.

(*c*) *Right v. Darby*, 1 T. R. 159, 162; *Cobb v. Stokes*, 8 East, 358.

(*d*) *Doe v. Miles*, 1 Stark. 181;

*Wilson v. Abbott*, 3 B. & C. 88;

*Furnivall v. Grove*, 8 C. B. N. S. 496; *White v. Bayley*, 10 C. B. N. S. 227.

(*e*) *Sparrow v. Hawkes*, 2 Esp. 505.

(*f*) 14 & 15 Vict. c. 25, s. 1.

(*g*) See p. 47.

(*h*) See p. 49.

(*i*) *Cornish v. Stubbs*, L. R. 5 C. P. 334; *Mellor v. Watkins*, L. R. 9 Q. B. 400.

(*k*) See p. 130.

A notice to quit is unnecessary when there has been a surrender of the term (*l*) or a disclaimer (*m*).

## 2. Demand of Possession.

A demand of possession (*n*) must be made by a landlord before commencing an action to recover possession from his tenant at will, unless such tenancy has been legally determined by entry (*o*), or otherwise. To determine tenancy at will.

The demand may be either verbal or in writing. It may be made upon any person on the premises, or may be made off the premises if communicated to the tenant at will (*p*). It may be made by an agent provided he have authority at the time he makes the demand (*q*). Any verbal or written communication to the tenant which amounts to a clear expression of the determination of the will is a sufficient demand (*r*). How made.

A demand of possession is unnecessary when the tenancy at will is determined by entry or otherwise. The tenancy at will is determined when the landlord has done any act upon the premises which is inconsistent with the continuance of the will, and for which he would otherwise be liable to an action of trespass (*s*), such as an entry to take possession (*s*), or to cut stone (*s*) or trees (*s*), or the doing of Unnecessary when tenancy determined by entry or otherwise.

(*l*) See p. 50, 51.

(*m*) See p. 51, 53.

(*n*) *Goodtitle v. Herbert*, 4 T. R. 680 ; *Doe v. Jackson*, 1 B. & C. 448 ; *Doe v. McKaeg*, 10 B. & C. 721 ; *Doe v. Phillips*, 10 Q. B. 130.

(*o*) *Wallis v. Delmar*, 29 L. J. Ex. 276.

(*p*) *Roe v. Street*, 2 A. & E. 329 ; *Pinhorn v. Souster*, 8 Exch. 763, 770.

(*q*) *Doe v. Walker*, 14 L. J. Q.

B. 181.

(*r*) *Doe v. Lawder*, 1 Stark. 308 ; *Doe v. Price*, 9 Bing. 356 ; *Pollen v. Brewer*, 7 C. B. N. S. 371 ; *Locke v. Matthews*, 13 C. B. N. S. 753 ; *Coatsworth v. Johnson*, 55 L. J. Q. B. 220.

(*s*) *Ball v. Cullimore*, 2 C. M. & R. 120 ; *Doe v. Thomas*, 6 Exch. 854 ; *Turner v. Doe*, 9 M. & W. 643 ; *Locke v. Matthews*, *supra* ; Co. Lit. 55 b.

How tenancy at will determined otherwise than by demand.

any act which is equivalent to entry. The tenancy is also determined when the landlord has done any act off the premises which is an assertion of his right to the possession, such as making a lease to commence presently (*t*), or assigning his reversion (*u*); and, perhaps, when he becomes bankrupt (*v*). The death of the landlord terminates a tenancy at will (*x*).

A tenancy at will is determined if the tenant commits waste (*y*); disclaims (*z*); assigns or attempts to assign his interest (*a*); purchases the freehold (*b*); or dies (*x*); or, perhaps, if he becomes bankrupt (*c*). When a purchaser has become tenant at will to the vendor by taking possession under a contract of sale, such tenancy is determined by rescission of the contract (*d*); but if the purchaser continues in possession afterwards it is a question of fact whether or not a new tenancy at will has been created (*d*). The death of one joint tenant does not determine the tenancy of the other (*e*).

Knowledge of landlord or tenant.

Any act done or suffered by the tenant does not determine the tenancy at will unless the landlord have notice or knowledge thereof (*k*); nor does any act done or suffered by the landlord off the premises unless the tenant have notice or knowledge thereof (*k*).

(*t*) *Dinsdale v. Iles*, 2 Lev. 88.

(*u*) *Doe v. Thomas*, *supra*; *Doe v. Davies*, 7 Exch. 89; *Farrelly v. Robins*, Ir. Rep. 3 C. L. 284.

(*v*) *Doe v. Thomas*, *supra*.

(*x*) *James v. Dean*, 11 Ves. 383, 391.

(*y*) Co. Lit. 57 a.

(*z*) *Doe v. Cawdor*, 1 C. M. & R. 398; *Doe v. Price*, 9 Bing. 356.

(*a*) *Pinhorn v. Souster*, 8 Exch. 763.

(*b*) *Daniels v. Davison*, 16 Ves. 249, 252.

(*c*) *Doe v. Thomas*, 6 Exch. 854.

(*d*) *Doe v. Sayer*, 3 Camp. 8; *Markey v. Coote*, Ir. Rep. 10 C. L. 149.

(*e*) Co. Lit. 55 b.

(*k*) *Carpenter v. Collins*, Yelv. 73; *Pinhorn v. Souster*, 8 Exch. 763; *Melling v. Leak*, 16 C. B. 652, 669; Co. Lit. 55 b.

A demand of possession is unnecessary before commencing an action to recover possession from a mere trespasser (*l*) ; or upon a right to re-enter for a forfeiture (*m*) ; or upon non-payment of an annuity ; or upon a right to enter and hold until an annuity is paid (*n*) ; or from a mortgagor (*o*).

Demand unnecessary in other cases.

A demand of possession is unnecessary before commencing an action to recover possession from a tenant at sufferance (*p*).

Tenancy at sufferance.

When proceedings are taken by a landlord under s. 213 of the C. L. P. Act, 1852, he must make a demand of possession in writing before commencing his action ; this demand must be served personally or left at the dwelling-house or usual place of abode of the tenant or of the person holding or claiming through or under him (*q*).

Demand under C. L. P. Act, 1852.

### 3. *Efflux of Time.*

When the demise is for a term certain, the tenancy is determined upon the expiration of that term, and the landlord is immediately entitled to possession and the tenant ought thereupon to quit.

Demise for term certain.

If the tenant holds over, he becomes a tenant at sufferance, or he may become a yearly tenant by payment of rent (*r*), or, after a lease for one year, by continuing

Holding over.

(*l*) *Doe v. White*, 2 D. & R. 716 ; *Doe v. Boulton*, 6 M. & S. 148 ; *Doe v. Quigley*, 2 Camp. 505.

(*m*) *Liddy v. Kennedy*, Ir. Rep. 1 C. L. 105 ; *Talbot de Malahide v. Odium*, Ir. Rep. 5 C. L. 302. (*n*) *Doe v. Horsley*, 1 A. & E. 766.

(*o*) *Doe v. Giles*, 5 Bing. 421 ; *Doe v. Maisiey*, 8 B. & C. 767.

See Chap. 12.

(*p*) *Doe v. Roberts*, 16 M. & W. 778 ; *Doe v. Quigley*, 2 Camp. 505.

(*q*) 15 & 16 Vict. c. 76.

(*r*) *Doe v. Stennett*, 2 Esp. 717 ; *Hyatt v. Griffiths*, 17 Q. B. 505 ; *Doe v. Amey*, 12 A. & E. 476 ; *Caulfield v. Farr*, Ir. R. 7 C. L. 469 ; *Doe v. Bell*, 2 Sm. L. C. 110 (ed. 9) ; *Kelly v. Patterson*, L. R. 9 C. P. 681.

in possession as tenant with the consent of both parties (s).

Tenant under  
void agree-  
ment for  
definite term.

When a tenant has entered and paid rent under an agreement for a definite term, or under a lease void at law as being a lease for more than three years and not under seal, and thereby becomes a yearly tenant, and has occupied during the whole period, the tenancy ceases at the end of that period by effluxion of time, an agreement that it should cease at the end of a definite term not being inconsistent with a tenancy from year to year (t). Since the Judicature Acts, however, a tenant holding under an agreement of *which specific performance would be decreed*, is in the same position as if a lease had been duly granted, both at law and in equity, and is not merely a tenant from year to year (u).

Since the  
Judicature  
Acts.

Term for  
certain period  
or until an  
event.

When a tenancy is limited for a term certain or until the happening of some event, it will cease upon the expiration of the term for which it was granted or upon the happening of the event (x).

#### 4. Surrender.

A surrender is effected either by the act of the parties, or by operation of law.

By act of  
parties.

No particular words are necessary to constitute a surrender by act of the parties, provided that the agreement to surrender is clear (y). The Statute of Frauds (z) provides

(s) *Dougal v. McCarthy*, [1893] 1 Q. B. 736.

(t) *Doe v. Moffatt*, 15 Q. B. 257.

(u) *Walsh v. Lonsdale*, 21 Ch. D. 9. See p. 2.

(x) *Brudnell's case*, 5 Co. Rep. 9 a; *Hughes and Crowther's case*, 13 Co. Rep. 66; *Doe v. Clarke*, 8

East, 185; *Belaney v. Kelly*, 24 L. T. 738.

(y) *Weddall v. Capes*, 1 M. & W. 50; *Johnstone v. Hudleston*, 4 B. & C. 922; *Bessell v. Landsberg*, 7 Q. B. 638; *Mollett v. Brayne*, 2 Camp. 103.

(z) 29 Car. II. c. 3, s. 3, App. B, p. 295.



that every surrender, except of copyholds or customary estates, must be in writing, or by act and operation of law (a); and the statute 8 & 9 Vict. c. 106 (b), provides that a surrender in writing, except of copyholds or of an estate which might have been created without writing, must be made by deed (b).

A surrender by act and operation of law takes place when a tenant accepts a new lease for a new term, even if less than the existing term (c), provided that such an estate pass by the new lease as appears thereby to have been contemplated by the parties at the time (d); also when the landlord and tenant have agreed that the tenancy should cease and that the landlord should re-enter, and the tenant has quitted and the landlord has re-entered, the change of possession being essential (e); but the grant of a new lease to a third person, with the consent of the tenant, does not operate as a surrender of the old lease unless the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease to which he assents (f).

By act and operation of law.

### 5.—Disclaimer.

In order to constitute a disclaimer something must be done by the tenant which amounts to a direct repudiation of the relationship of landlord and tenant, and is necessarily inconsistent with that relationship (g).

What amounts to disclaimer.

(a) 29 Car. II. c. 3, s. 3, App.

B, p. 295.

(b) S. 3.

(c) Bac. Abr., Leases, (S) 2.

(d) *Doe v. Poole*, 11 Q. B. 713.

(e) *Grimman v. Legge*, 8 B. & C. 324; *Mollet v. Brayne*, 2 Camp. 103; *Moss v. James*, 37 L. T. 715; *Oastler v. Henderson*, 2 Q. B. D. 575; *Phené v. Popplewell*, 12 C. B. N. S. 334; *Easton*

*v. Penny*, 67 L. T. 290.

(f) *Wallis v. Hands*, [1893] 2 Ch. 75; *Baring v. Abingdon*, [1892] 2 Ch. 374, 381; *Davison v. Gent*, 1 H. & N. 744; 2 Smith's L. C., p. 917 *et seq.* (ed. 9).

(g) *Doe v. Stanion*, 1 M. & W. 695; *Doe v. Long*, 9 C. & P. 773; *Doe v. Cooper*, 1 M. & Gr. 135; *Vivian v. Moat*, 16 Ch. Div. 730.

Definite term  
of years.

A mere verbal disclaimer does not cause a forfeiture of a definite term of years (*h*), nor does a mere payment of rent to a third person (*i*), the giving up possession, in fraud of the landlord, to a third person who claims under a hostile title will be sufficient (*j*), or any disclaimer by matter of record (*k*).

Yearly  
tenancy.

In the case of a yearly tenancy a parol denial of the landlord's title (*l*), the setting up of a title to the premises in another (*m*), or attorning tenant to another (*m*), or assisting another to set up a title (*n*), or a claim of title by the tenant himself (*o*), operates as a disclaimer and dispenses with the necessity of a notice to quit. When a tenant at will has disclaimed, a demand of possession is unnecessary (*p*).

Tenancy at  
will.

A mere refusal to pay rent to the devisee of the landlord under a contested will until the contest is decided (*q*), or a claim to hold as purchaser from the landlord (*r*), or the withholding of rent while honestly inquiring into an assignee's title (*s*), or a mere renunciation of the

(*h*) *Doe v. Wells*, 10 A. & E. 427; *Doe v. Rollings*, 4 C. B. 188, 192, per Maule, J.

(*i*) *Doe v. Parker*, Gow. 180.

(*j*) *Doe v. Flynn*, 1 C. M. & R. 137.

(*k*) Comyns' Dig. tit. Forfeiture, A.; Vin. Abr. tit. Estate, Forfeiture, C.

(*l*) *Doe v. Stanion*, 1 M. & W. 695, 702; *Vivian v. Moat*, 16 Ch. Div. 730.

(*m*) *Doe v. Pittman*, 2 N. & M. 673; *Doe v. Grubb*, 10 B. & C. 816; *Doe v. Froud*, 4 Bing. 557; *Doe v. Evans*, 9 M. & W. 48; *Doe v. Rollings*, 4 C. B. 188;

*Doe v. Long*, 9 C. & P. 773.

(*n*) *Doe v. Flynn*, 1 C. M. & R. 137.

(*o*) *Doe v. Whittick*, Gow. 195; *Doe v. Gover*, 17 Q. B. 589.

(*p*) *Doe v. Cawdor*, 1 C. M. & R. 398; *Doe v. Price*, 9 Bing. 356; *Doe v. Thompson*, 5 A. & E. 532.

(*q*) *Doe v. Pasquali*, 1 Peake, 259.

(*r*) *Doe v. Stanion*, 1 M. & W. 695.

(*s*) *Doe v. Cooper*, 1 M. & Gr. 135; *Jones v. Mills*, 10 C. B. N. S. 788.

tenancy which was intended to operate as a surrender (*t*), do not amount to a disclaimer.

A disclaimer must have been made on or before the day on which the landlord claims to have become entitled to possession (*u*).

A disclaimer may be waived in the same way as a forfeiture (*x*). Waiver.


(*t*) *Doe v. Staggy*, 5 B. N. C. 773; *Doe v. Grubb*, 10 B. & C. 564. 816.

(*u*) *Doe v. Cawdor*, 1 C. M. & R. 398; *Doe v. Long*, 9 C. & P. 322. (*x*) *Doe v. Williams*, 7 C. & P. See *post*, Waiver, Chap. 11.

## CHAPTER VII.

### FORFEITURE.

**What landlord must prove.**      **WHEN** a landlord proceeds to recover possession of the demised premises from the tenant upon the ground that the demise has been determined by a forfeiture, he must prove the demise (*a*), and the forfeiture incurred.

**How forfeiture incurred.**      Forfeiture may be incurred for breach of some condition; or for breach of some covenant or agreement,  when a power of re-entry is reserved upon such breach; or for non-payment of rent, if reserved under a condition, or if there is a proviso for re-entry upon non-payment; or upon the happening of any event which by the terms of the demise is made a cause of forfeiture.

**Condition broken.**      For any *condition* broken the landlord may re-enter and maintain an action of ejectment, although there is in the lease no proviso for re-entry (*b*); but he cannot re-enter for a mere breach of covenant or agreement unless it is fortified by a proviso for re-entry (*c*). It is, therefore, often a question of importance whether a clause or agreement operates as a *condition*, or as a *covenant* only.

**How condition is created.**      A condition may be introduced into an agreement or into a lease for years, not under seal, provided apt and proper words be used; no precise form of words is necessary, but it is sufficient if it appear that the words used

(*a*) *Ante*, p. 25.

(*b*) *Doe v. Watt*, 8 B. & C. 308; *Re Brain*, 10 Eq. 389.

(*c*) Co. Lit. s. 325; *Doe v. Phillips*, 2 Bing. 13; *Crawley v. Price*, L. R. 10 Q. B. 302.

were intended to have the effect of creating a condition (*d*). Mere words of agreement do not create a condition so as to give a right of re-entry for breach of such agreement (*e*). A proviso, without a penalty, is as a general rule, a condition (*f*); but if a penalty is annexed it is only a covenant (*g*). If words both of covenant and condition are used, they will both operate, and will create respectively a covenant and a condition (*g*). A demise of premises for a specified purpose imports an agreement by the tenant not to use the premises for any other purpose (*h*).

A condition is frequently created in express terms for forfeiture upon the happening of certain events, or the doing of certain acts, besides breaches of covenant; for instance, upon bankruptcy of the lessee (*i*), or the taking in execution of the term (*k*); upon default in payment of monies due after demand in writing (*l*); upon the lessee ceasing to occupy personally (*m*), or being unable to go on with the management of the farm (*n*); upon the lessee ceasing to be in the lessor's service (*o*);

Instances.

(*d*) *Doe v. Watt*, 8 B. & C. 308; *Simpson v. Titterell*, Cro. Eliz. 242; *Pembroke v. Berkeley*, *Id.* 384, 560. As to the construction placed upon words in particular cases, see *Sear v. House Co*, 16 Ch. D. 387; *Brookes v. Drysdale*, 3 C. P. D. 52; *Lehmann v. McArthur*, 3 Ch. 496; *Shep. Touch*. 162.

(*e*) *Shaw v. Coffin*, 14 C. B. N. S. 372; *Crawley v. Price*, L. R. 10 Q. B. 302.

(*f*) *Harrington v. Wise*, Cro. Eliz. 486.

(*g*) *Doe v. Watt*, 8 B. & C. 308.

(*h*) *Kehoe v. Lansdowne*, [1893]

A. C. 451.

(*i*) *Roe v. Galliers*, 2 T. R. 133; *Doe v. Ingleby*, 15 M. & W. 465; *Doe v. David*, 1 C. M. & R. 405; *Ex parte Gould*, 13 Q. B. D. 454; *Re Tickle*, 3 M. B. R. 126; *Doe v. Rees*, 4 B. N. C. 384; *Pugh v. Arton*, 8 Eq. 626.

(*k*) *Davis v. Eyton*, 7 Bing. 154; *R. v. Topping*, Mc. & Y. 544.

(*l*) *Jackson v. Northampton Trams*, 55 L. T. 91.

(*m*) *Doe v. Clarke*, 8 East, 185.

(*n*) *Doe v. Pritchard*, 5 B. & Ad. 765.

(*o*) *Wrenford v. Gyles*, Cro. Eliz. 643.

upon assignment by the lessee (*p*) ; upon conviction of the lessee for an offence against the game laws (*q*) ; upon the death of A. before a certain time (*r*).

Conditions  
may be  
created upon  
any demise.

Conditions, and covenants or agreements coupled with a proviso for forfeiture, may be contained in a lease or in an agreement for a lease (*s*) ; or a parol demise may be made subject to any conditions, stipulations, or provisos (*t*).

Construction  
of provisos  
for re-entry.

The general rule is that a proviso for re-entry must be construed strictly, though probably not with the strictness of a condition at common law (*u*). It ought clearly to appear that the proviso was meant to include and does include the covenant for breach whereof the right to re-enter is claimed (*u*) ; but the question whether the covenant itself has been broken is to be determined according to the rules which prevail in construing ordinary contracts (*x*). The apparent intention of the parties should be considered in construing both covenants and provisos (*y*), and the court must be satisfied that the particular case comes within their terms (*y*). If the meaning is clear the court will enforce the right of re-entry whatever the hardship

(*p*) *Doe v. Watt*, 8 B. & C. 308 ; *Knight v. Mory*, Cro. Eliz. 60.

(*q*) *Stevens v. Copp*, L. R. 4 Ex. 20.

(*r*) *Hughes' case*, 13 Co. Rep. 66.

(*s*) *Doe v. Breach*, 6 Esp. 106 ; *Doe v. Powell*, 5 B. & C. 308, 312 ; *Doe v. Watt*, 8 B. & C. 308 ; *Doe v. Birch*, 1 M. & W. 402 ; *Thomas v. Packer*, 1 H. & N. 669 ; *Hayne v. Cummings*, 16 C. B. N. S. 421 ; *Hyatt v. Griffiths*, 17 Q. B. 506 ; *Crawley v. Price*, L. R. 10 Q. B. 302.

(*t*) *Bolton v. Tomlin*, 5 A. & E. 856.

(*u*) *Doe v. Ingleby*, 15 M. & W. 465, 469 ; *Doe v. Marchetti*, 1 B. & Ad. 715, 720 ; *Hardy v. Seyer*, Cro. Eliz. 414 ; *Croft v. Lumley*, 6 H. L. C. 672, 693 ; and see *Doe v. Elsam*, M. & M. 189 ; *Jackson v. Northampton*, 55 L. T. 91.

(*x*) *Doe v. Godwin*, 4 M. & S. 265 ; *Croft v. Lumley*, 6 H. L. C. 672, 693.

(*y*) *Goodtitle v. Saville*, 16 East, 87, 95 ; *Doe v. Abel*, 2 M. & S. 541, 547 ; *Hayne v. Cummings*, 16 C. B. N. S. 421 ; *Wooler v. Knott*, 1 Ex. D. 124, 265.

inflicted (z); if the meaning is doubtful, but a fair meaning can be given to the words used, the court will give such meaning to the words (a); if, however, the words be without sense, the court will not force a meaning upon them (b).

A proviso for re-entry upon breaches of covenant "hereinafter contained," will not apply to covenants which go before, even if there be none thereafter (c). If there be a proviso for re-entry if rent be in arrear for thirty days, and another proviso stating when that rent was payable and giving power to re-enter if it be in arrear at any time, the power to re-enter is governed by the last proviso (d). Under a proviso for re-entry "if and whenever any one quarter's rent shall be in arrear and no sufficient distress can be levied for the same," the lessor has a right of re-entry as often as at any moment of time such rent is in arrear, and there is no sufficient distress (g).

If an extra rent is reserved (h), or penalty imposed (i), upon breach of, or the rent is to be reduced upon performance of (k), any covenant, the lessor may still re-enter, under a proviso for that purpose, upon breach or non-performance of any covenant. The question in such case always is whether the parties intended to prevent the act being done altogether, or to permit it to be done

Instances.

Penalty upon non-observance of covenant.

- (z) *Doe v. Gladwin*, 6 Q. B. 231.  
 953, 961; *Doe v. Shewin*, 3  
 Camp. 134. (g) *Shepherd v. Berger*, [1891] 1  
 Q. B. 597.  
 (a) *Doe v. Bowditch*, 8 Q. B. (h) *Weston v. Metropolitan*  
 973; *Hunt v. Bishop*, 8 Exch. *Asylum*, 8 Q. B. D. 387, 404.  
 675. (i) *Doe v. Jepson*, 3 B. & Ad.  
 402.  
 (b) *Doe v. Carew*, 2 Q. B. 317. (k) *Hanbury v. Cundy*, 58 L. T.  
 265. 155.  
 (d) *Doe v. Golding*, 6 Moo.

upon payment of the stipulated price for the permission (*l*), and if it is clear that it was intended that the act should not be done at all, the lessee is not entitled to do the things prohibited by the covenant on payment of the increased rent or of the penalty (*ll*).

Positive and negative covenants.

A proviso for re-entry may be reserved upon breach of positive as well as of negative covenants, that is, for acts of commission and for acts of omission (*m*). There are *dicta* in some of the earlier cases to the effect that the word "perform," used in a proviso for re-entry, will not apply to breaches of negative covenants, and that some such words as "observe" or "keep" are necessary to include breaches of negative covenants (*n*). In a recent case, however, the judges in the Court of Appeal expressed an opinion that this distinction was not well founded (*o*). It would seem, therefore, that any of the words "observe," "perform," or "keep," will apply to breaches both of positive and negative covenants (*p*). It has been held that a proviso for re-entry "upon doing any act contrary to, or in breach of the covenants," did not apply to the breach of a covenant to repair (*q*).

Right to re-enter *quousque*.

The question often arises whether a proviso for re-entry upon non-payment of rent, or of an annuity, creates a forfeiture or gives only a right to enter and hold *quousque* until the arrears are satisfied (*r*): this question must be

(*l*) *Bray v. Fogarty*, Ir. Rep. 4 Eq. 544; *Hanbury v. Cundy*, *supra*.

(*ll*) See note (*k*), previous page.

(*m*) *Wadham v. Postmaster-General*, L. R. 6 Q. B. 644.

(*n*) *Hyde v. Warden*, 3 Ex. D. 72, 82; *Evans v. Davis*, 10 Ch. D. 747; *Wadham v. Postmaster-General*, L. R. 6 Q. B. 644, 648; *West v. Dobb*, L. R. 5 Q. B. 460.

(*o*) *Barrow v. Isaacs*, [1891] 1 Q. B. 417, 419, 424.

(*p*) *Evans v. Davis*, *supra*; *Timms v. Baker*, 49 L. T. 106; *Croft v. Lumley*, 6 H. L. C. 672; *Barrow v. Isaacs*, *supra*.

(*q*) *Doe v. Stevens*, 3 B. & Ad. 299.

(*r*) *Doe v. Bowditch*, 8 Q. B. 973; *Doe v. Horsley*, 1 A. & E.



determined in each case upon the construction of the terms of the proviso (r).

If performance of a covenant or condition is rendered impossible, or a breach thereof is made compulsory, by a subsequent statute, and such breach was not contemplated by the parties when the condition or covenant was made, a forfeiture for such non-performance or breach cannot be enforced (s). If the covenant or condition was not to do an act which was then unlawful, and the legislature subsequently makes the act lawful, this does not release the covenant or condition (t).

Performance impossible, or breach compulsory, by statute.

A power of re-entry inserted in accordance with the provisions of a private Act cannot be insisted upon if the provisions of such private Act are altered by a subsequent Act (u).

A distinction has been drawn between cases where the condition or proviso for forfeiture provides that the lease shall be absolutely void, and where the lease is to be voidable only (x), viz. that in the former cases the lease would *ipso facto* determine upon breach, while in the latter cases it would determine only at the election of the lessor. This distinction seems now to be of little importance, for it is well settled that a lessee cannot take advantage of his own wrong to assert that the lease has been forfeited (y) and the courts have in almost every possible case construed condi-

Lease void or voidable only.

766; *Barry v. Glover*, 10 Ir. C. L. R. 113.

(r) See last note.

(s) *Doe v. Rugeley*, 6 Q. B. 107; *Brewster v. Kitchell*, 1 Salk. 197; *Baily v. de Crespigny*, L. R. 4 Q. B. 180; Bac. Abr., Conditions (Q) 2; Com. Dig., Condition (L. 13). See *Doe v. Butcher*, 6 Q. B. 115.

(t) *Brewster v. Kitchell*, *supra*.

(u) *Doe v. Brandling*, 7 B. & C. 643.

(x) Co. Lit. 215 a; *Browning v. Beston*, Plowd. 130; *Doe v. Butcher*, 1 Doug. 50.

(y) *Doe v. Bancks*, 1 B. & Ald. 401; *Rede v. Farr*, 6 M. & S. 121.

tions and provisoes for forfeiture as making the lease voidable only at the option of the lessor for all purposes (z).

Who may  
enforce right  
of re-entry.

Before the Judicature Acts no one could re-enter for a forfeiture except the person then legally entitled to the rent or reversion (a), unless the tenant was estopped from denying his title (b); but now the effect of the Judicature Acts (c), and of the Conveyancing Act (d), 1881, is to enable any person beneficially entitled to the rent or reversion, or any part thereof if severed, to enforce a right of re-entry.

Beneficial  
owner of  
reversion.

Lessor cannot  
after assign-  
ment of  
reversion.

A lessor cannot enforce a right of re-entry after he has parted with his reversion (e), or after the reversion has been merged or extinguished (f); but a lessee who has demised the whole of his interest, subject to a right of re-entry, may enforce such right of re-entry (g), though he has no reversion and cannot distrain because an under-lease for the whole term of the under-lessor is equivalent to an assignment (h). If a sub-lessor grants to his sub-lessee the residue of his interest from the determination of the sub-lease, that is a grant of an *interesse termini*, and the right of re-entry contained in the sub-lease is not destroyed (i).

(z) *Arnaby v. Woodward*, 6 B. & C. 519; *Roberts v. Davey*, 4 B. & Ad. 664; *Doe v. Birch*, 1 M. & W. 402; *Davenport v. The Queen*, 3 App. Cas. 115; *Victoria, A.-G. of v. Ettershank*, L. R. 6 P. C. 354. See p. 107.

(a) *Doe v. Adams*, 2 C. & J. 232; *Moore v. Plymouth*, 3 B. & Ald. 66.

(b) See p. 27.

(c) Judicature Act, 1873, s. 24 (36 & 37 Vict. c. 66).

(d) 44 & 45 Vict. c. 41, ss. 10,

11, 12.

(e) *Fenn v. Smart*, 12 East, 444; *Doe v. Edwards*, 5 B. & Ad. 1065. See p. 32.

(f) *Webb v. Russell*, 3 T. R. 393.

(g) *Doe v. Bateman*, 2 B. & Ald. 168; *Colville v. Hall*, 14 Ir. C. L. R. 265; see *Hyde v. Warden*, 3 Ex. D. 72.

(h) *Beardman v. Wilson*, L. R. 4 C. P. 57.

(i) *Hyde v. Warden*, 3 Ex. D. 72.

A right of re-entry cannot effectually be reserved to a stranger to the estate out of which the lease is granted (*k*), unless he has joined in the demise, in which case the tenant is estopped by the lease from denying that the lessors were joint tenants or had power to demise jointly (*l*).

Stranger to the lease cannot.

A right of re-entry, reserved in an underlease, to both the original lessor and the underlessor, gives each of them a separate right of re-entry (*n*).

By the common law an assignee of the reversion could not enforce a right of re-entry for condition broken, or under a proviso for re-entry, such a right being inalienable. To remedy this, the statute of 32 Hen. VIII. c. 34, was passed, by which the grantees or assignees of reversions on leases were enabled to re-enter for breach of condition or covenant.

Assignee of the reversion.

32 Henry viii. c. 34.

That statute applied only to leases under seal and, therefore, the assignee of the reversion upon a lease not under seal could not re-enter by virtue of that statute (*o*). Where, however, in the case of tenancies not created by deed, there had been an acceptance of rent or some other act affirming the tenancy (*p*) after an assignment, a conventional law was made, having the same effect as the statute of Hen. VIII., and it was inferred that the parties had agreed to continue upon the terms of the original lease (*q*).

(*k*) *Doe v. Laurence*, 4 Taunt. 23 ; *Doe v. Goldsmith*, 2 Cr. & J. 674.

(*l*) *Doe v. Goldsmith*, *supra*. See p. 28.

(*n*) *Doe v. White*, 4 Bing. 276.

(*o*) *Brydges v. Lewis*, 3 Q. B. 603 ; *Standen v. Christmas*, 10 Q. B. 135 ; *Elliott v. Johnson*, L. R.

2 Q. B. 120.

(*p*) See p. 29.

(*q*) *Cornish v. Stubbs*, L. R. 5 C. P. 334 ; *Smith v. Eggington*, L. R. 9 C. P. 145 ; *Elliott v. Johnson*, L. R. 2 Q. B. 120 ; *Buckworth v. Simpson*, 1 C. M. & R. 834.

22 & 23 Vict.  
c. 35.

Under the statute of Henry VIII. an assignee of the reversion in part of the lands could not enforce a right of re-entry (*r*), but the assignee of part of the reversion in all the lands could do so (*s*). By the statute 22 & 23 Vict. c. 35, it was provided that where the reversion on a lease is severed, and the rent or other reservation is equally apportioned, the assignee of each part of the reversion shall have, in respect to his portion of the rent or reservation, the benefit of all conditions of re-entry for *non-payment of rent*, as if the same had been reserved to him (*t*).

The Act of Hen. VIII. extends to a surrenderee of copyholds (*u*), to the assignee of the reversion upon a lease of incorporeal hereditaments (*x*), to the remaindermen and reversioners in a settlement (*y*), for they are the assigns of the settlor (*y*), and to assignees by estoppel (*z*).

Conveyancing  
Act, 1881.

Now, by the Conveyancing Act, 1881 (*a*), with respect to leases made since December 31, 1881, the benefit of every covenant or provision in a lease, having reference to the subject-matter thereof, and every condition of re-entry and other condition, runs with the reversionary estate in the whole or part of the land, notwithstanding severance, and can be enforced and taken advantage of by the person for the time being entitled to the income of the whole or

Severance of  
reversion.

(*r*) *Doe v. Lewis*, 5 A. & E. 277; *Twynam v. Picard*, 2 B. & Ald. 105; see *Hyde v. Warden*, 3 Ex. D. 72.

(*s*) *Kidwelly v. Brand*, Plowd. 69; *Altos v. Hemmings*, 2 Bulstr. 281; *Wright v. Burroughes*, 3 C. B. 685.

(*t*) S. 3.

(*u*) *Glover v. Cope*, 4 Mod. 80; *Whitton v. Peacock*, 3 M. & K. 325.

(*x*) *Martyn v. Williams*, 1 H. & N. 817; *Norval v. Pascoe*, 34 L. J. Ch. 82; *Hooper v. Clark*, L. R. 2 Q. B. 200; *Egremont v. Keene*, 2 Jones, Ir. Exch. 307.

(*y*) *Greenaway v. Hart*, 14 C. B. 340, 348; *Isherwood v. Oldknow*, 3 M. & S. 382.

(*z*) *Cuthbertson v. Irving*, 4 H. & N. 742; 6 *id.* 135.

(*a*) 44 & 45 Vict. c. 41.

part of the demised premises (b). And, further, every condition or right of re-entry and every other condition in a lease shall, upon severance of the reversionary estate, or upon avoidance or cesser of the term as to part only of the land, be apportioned and be annexed to the severed parts of the reversionary estate, as if the land comprised in each severed part, or the land as to which the term remains subsisting, had alone originally been comprised in the lease (c).

Assignee of part of reversion.

Assignee of reversion in part of the land.

Under these provisions the assignee of the whole or part of the reversion, or the assignee of the reversion in the whole or part of the lands, can enforce a right of re-entry; and, where the term as to part of the lands has been avoided, or otherwise ceased, the owner of the reversion in the part of the land which still remains subject to the lease can enforce a right of re-entry.

These sections speak of a "lease," and it has been held that the word "lease" in s. 14 applies only to an actual lease, and perhaps to an agreement for a lease where the tenant is entitled to specific performance (d). Presumably the same construction must be given to the word "lease" in ss. 10 and 12.

To what leases Conveyancing Act, 1881, applies.

An assignee of the reversion can re-enter for such forfeiture only as has been incurred after he became assignee (e); for such forfeiture he can re-enter, although no notice of the assignment has been given to the tenant (f), except that notice must have been given to the tenant before there can be forfeiture for non-payment of rent (g). An assignee cannot re-enter for a forfeiture incurred before

Assignee cannot re-enter for forfeiture incurred before assignment.

(b) S. 10.

(c) S. 12.

(d) *Swain v. Ayres*, 21 Q. B. D. 289.

(e) *Fenn v. Smart*, 12 East, 444

(f) *Scallock v. Harston*, 1 C. P. D. 106.

(g) *Mallory's case*, 5 Co. Rep. 111 b; *Francis's case*, 8 Co. Rep. 92a.

Devisee of  
reversion.

he became assignee, for a right of re-entry for condition broken is not assignable (*h*); but a devisee of the reversion can re-enter for a forfeiture incurred during the life of his testator (*i*).

Covenants  
and condition  
running with  
reversion.

An assignee of the reversion cannot re-enter for every breach of condition or covenant which might have entitled the original lessor to re-enter. The statute of Henry VIII. was held to apply only to conditions and covenants which touch and concern the thing demised, and not to collateral conditions and covenants (*k*). The Conveyancing Act, 1881, uses the words, "having reference to the subject-matter of the lease" (*l*), which presumably are intended to have the same meaning as the rule laid down in *Spencer's case*. The benefit of such conditions and covenants as do touch and concern the demised premises runs with reversion whether assigns are named or not (*m*).

Instances.

The following conditions and covenants have been held to run with the land or reversion:—to pay rent (*n*); to repair (*o*); to insure (*p*); not to alienate (*q*); to reside

(*h*) *Hunt v. Bishop*, 8 Exch. 675; *Hunt v. Remnant*, 9 Exch. 635; *Martyn v. Williams*, 1 H. & N. 817; *Johnson v. St. Peter*, 4 A. & E. 520; *Bennett v. Herring*, 3 C. B. N. S. 370.

(*i*) Wills Act, 1838, 1 Vict. c. 26, s. 3. See *post*, p. 153.

(*k*) *Spencer's case*, 1 Sm. L. C. 63 (9th Ed.); *Vernon v. Smith*, 5 B. & Ald. 1; *Doe v. Peck*, 1 B. & Ad. 428; *Hooper v. Clark*, L. R. 2 Q. B. 200; *Stevens v. Copp*, L. R. 4 Ex. 20; *Webb v. Russell*, 3 T. R. 393.

(*l*) S. 10.

(*m*) Conveyancing Act, 1881, s. 58; *Lougher v. Williams*, 2 Lev. 92.

(*n*) *Parker v. Webb*, 3 Salk. 5; *Stevenson v. Lambard*, 2 East, 575; *Paul v. Nurse*, 8 B. & C. 486; *Williams v. Bosanquet*, 1 B. & B. 238.

(*o*) *Wakefield v. Brown*, 9 Q. B. 209; *Minshull v. Oakes*, 2 H. & N. 793; *Hornidge v. Wilson*, 11 A. & E. 645; *Martyn v. Clue*, 18 Q. B. 661; *Buckley v. Pirk*, 1 Salk. 316; *Greenaway v. Hart*, 14 C. B. 340; *Williams v. Earle*, L. R. 3 Q. B. 739; *Scaltock v. Harston*, 1 C. P. D. 106.

(*p*) *Vernon v. Smith*, 5 B. & Ald. 1; *Ex parte Gorely*, 34 L. J. Bank. 1.

(*q*) *Williams v. Earle*, L. R. 3 Q. B. 739; *West v. Dobb*, L. R.

constantly upon the premises (*r*); as to user (*s*), mode of occupation (*t*), and cultivation of the premises (*u*); to keep the premises well stocked with game (*x*); to allow the landlord a right of passage over the premises (*y*); to pay all rates, taxes, &c. (*z*); to grind all corn grown on the premises at the mill of the lessor (*a*); probably, also, conditions for forfeiture upon bankruptcy or the taking in execution of the term (*b*), though there is no express decision upon this point, for the same reasoning would appear to apply to this condition as to conditions against alienation or for personal residence; also, to build upon the demised premises (*c*); and, to convey upon a demised railway all coal gotten from certain mines (*d*).

The following conditions and covenants have been held not to run with the land or reversion: not to build a public-house within a certain distance of the demised premises (*e*); to pay an amount, or any sum, not being

Covenants and conditions not running with reversion.

4 Q. B. 634, 637; *Hammond v. Colls*, 1 C. B. 916. See *Paul v. Nurse*, 8 B. & C. 486, where a contrary opinion is indicated.

(*r*) *Tatem v. Chaplin*, 2 H. Bl. 133.

(*s*) *Wilkinson v. Rogers*, 12 W. R. 119; *Congleton v. Pattison*, 10 East, 130; but see *Wilson v. Hart*, 1 Ch. 463, 466 per Turner, L.J.

(*t*) *Bally v. Wells*, 3 Wils. 25.

(*u*) *Cockson v. Cock*, Cro. Jac. 125.

(*x*) *Hooper v. Clark*, L. R. 2 Q. B. 200.

(*y*) *Cole's case*, 1 Salk. 196.

(*z*) *Windsor's case*, 5 Co. Rep. 24 b.; *Hartley v. Hudson*, 4 C. P. D. 367; *Jeffrey v. Neale*,

L. R. 6 C. P. 240; *Bennett v. Womack*, 7 B. & C. 627; *Watson v. Atkins*, 3 B. & Ald. 647.

(*a*) *Vyryan v. Arthur*, 1 B. & C. 410.

(*b*) See *Roe v. Galliers*, 2 T. R. 133; *Doe v. Pritchard*, 5 B. & Ad. 765; where the point was discussed but not decided.

(*c*) *Sampson v. Easterby*, 9 B. & C. 505; *Doughty v. Bowman*, 11 Q. B. 444; *Hunt v. Bishop*, 8 Exch. 675; *Hunt v. Remnant*, 9 Exch. 635; *Cockson v. Cock*, Cro. Jac. 125.

(*d*) *Hemingway v. Fernandes*, 13 Sim. 228.

(*e*) *Thomas v. Haywood*, L. R. 4 Ex. 311.

Forfeiture by  
assignee of  
term.

rent (*f*); those which relate to chattels demised along with the premises (*g*); for forfeiture upon the conviction of the tenant or occupier for any offence against the game laws (*h*); not to employ persons from other parishes upon the demised premises (*i*); to trade only with the lessor (*k*).

When a landlord seeks to eject an assignee of the lease for condition broken, it is, in most cases, only material to consider the precise words of the condition, to see whether it does in terms apply to an assignee, and it is immaterial whether the burden of the condition runs with the land or not (*l*); for the lessor has a right to make the estate of his lessee conditional upon any event, and an assignee takes it subject to the condition, and is liable to forfeiture for the breach of it (*l*). If the condition be that the doing, or the omitting to do, any act, by the lessee or by an assignee, shall cause a forfeiture, then the landlord can re-enter if such act be done or be omitted to be done by the lessee or by an assignee (*m*).

The only cases in which it can be material to consider whether the burden of the condition runs with the land or not, are those in which the condition does not in its terms apply to an assignee, and the act or omission for which a forfeiture is alleged to have been incurred, is the act or omission of the assignee, and not of the lessee. In such

(*f*) *Lambert v. Norris*, 2 M. & W. 333; *Hoby v. Roebuck*, 7 Taunt. 156; *Donellan v. Read*, 3 B. & Ad. 899.

(*g*) *Gorton v. Gregory*, 3 B. & S. 90; *Williams v. Earle*, L. R. 3 Q. B. 739.

(*h*) *Stevens v. Copp*, L. R. 4 Ex. 20.

(*i*) *Congleton v. Pattison*, 10 East, 130; see also *Walsh v. Fussell*, 6 Bing. 163.

(*k*) See *Hartley v. Pehall*, Peake, 178.

(*l*) *Doe v. Peck*, 1 B. & Ad. 428.

(*m*) *Stevens v. Copp*, L. R. 4 Ex. 20; *Doe v. Peck*, 1 B. & Ad. 428; *Roe v. Harrison*, 2 T. R. 425; *Doe v. Pritchard*, 5 B. & Ad. 765; *Doe v. David*, 1 C. M. & R. 405; *Williamson v. Williamson*, 9 Ch. 729.



cases the assignee will be liable to ejectment only if the condition is one that runs with the land (n).

In *Smith v. Gronow*, there was a proviso for re-entry if "the lessee, his executors, administrators, or assigns should become bankrupt"; after assignment with the consent of the lessor, the lessee became bankrupt, and Wright, J., held that the proviso referred only to the bankruptcy of the person for the time being entitled to the term, and that no forfeiture had been incurred (o).

If two or more houses or parcels of land are demised by one lease which contains a proviso for re-entry upon breach of covenant or condition, an assignee or under-lessee of any part of the demised premises may be ejected for forfeiture incurred by breach of covenant or condition committed by the tenant of another part of the demised premises, though he himself has performed all the conditions and covenants (p). The provisions of the Conveyancing Act, 1881, have made no difference in this respect (q).

Forfeiture when land demised has been subdivided.

The lease is determined upon forfeiture from the time of the making of an entry, or the doing of some unequivocal act which is equivalent to entry (r).

Lease determined upon entry for forfeiture.

In order to determine a lease upon the ground of a forfeiture, where the lease is voidable at the option of the lessor, the landlord must make an entry, or do some other unequivocal act, showing an intention to insist upon the forfeiture, which is equivalent to an entry (s). A demise of

What is sufficient entry.

(n) *West v. Dobb*, L. R. 4 Q. B. 634; 5 *id.* 460.

(o) *Smith v. Gronow*, [1891] 2 Q. B. 394.

(p) *Darlington v. Hamilton*, Kay, 550.

(q) *Cresswell v. Davidson*, 56 L. T. 811.

(r) *Hartshorne v. Watson*, 4 B. N. C. 178.

(s) *Fenn v. Smart*, 12 East, 444; *Baylis v. Le Gros*, 4 C. B. N. S. 537; *Jones v. Carter*, 15 M. & W. 718, 725; *Roberts v. Davey*, 4 B. & Ad. 664.

the premises to a new tenant (*t*), or a new demise to a tenant or sub-tenant in possession (*u*), is such an act. An actual entry is any act done by the landlord which, if done by a person having no right to re-enter, would be a trespass (*x*); or an entry upon the premises by the landlord claiming to be entitled to possession (*y*).

Action of  
ejectment.

Before the Common Law Procedure Act, 1852, the service of a declaration in ejectment was held to determine the lease (*z*); since that Act, the bringing of an action of ejectment was held to be equivalent to an entry and to determine the term (*a*); and, since the Judicature Acts, Fry, J., said that an action of ejectment was "equivalent to the old entry" (*b*). In *Ex parte Dyke* (*c*), however, this point was elaborately argued, and the C. A. declined to express any opinion upon it.

Effect of  
re-entry.

The effect of such a determination is to destroy the right of possession under the lease both of the tenant himself and of all sub-tenants (*d*), and to give to the person who re-enters the same estate as the lessor had at the time of the demise, and to avoid all mesne estates (*e*).

Landlord's  
right to  
emblements  
and fixtures.

Upon re-entering, the lessor is entitled to the emblements and fixtures unless the tenant has protected himself by express agreement giving him a right to take or remove them after the end of the term (*f*).

Landlord's  
right to

When a landlord has enforced a right of re-entry for

- |  |  |
|--|--|
| ( <i>t</i> ) <i>Baylis v. Le Gros</i> , <i>supra</i> . | C. P. 360, 364.                                |
| ( <i>u</i> ) <i>Roberts v. Davey</i> , <i>supra</i> .  | ( <i>b</i> ) <i>Evans v. Davis</i> , 10 Ch. D. |
| ( <i>x</i> ) <i>Doe v. Wood</i> , 2 B. & Ald.          | 747, 763.                                      |
| 724; <i>Turner v. Doe</i> , 9 M. & W. 643.             | ( <i>c</i> ) 22 Ch. D. 410.                    |
| ( <i>y</i> ) <i>Doe v. Williams</i> , 5 B. & Ald.      | ( <i>d</i> ) <i>G. W. R. v. Smith</i> , 2 Ch.  |
| 783, 789.  | D. 235, 253.                                   |
| ( <i>z</i> ) <i>Goodright v. Cator</i> , 2 Doug.       | ( <i>e</i> ) Bac. Abr. Conditions, O. 4;       |
| 477; <i>Jones v. Carter</i> , 15 M. & W.               | Co. Lit. 202 a.                                |
| 718.   | ( <i>f</i> ) <i>Davis v. Eyton</i> , 7 Bing.   |
| ( <i>a</i> ) <i>Grimwood v. Moss</i> . L. R. 7         | 154; <i>Pugh v. Arton</i> , 8 Eq. 626.         |

non-payment of rent or for breach of any covenant or condition, he is not prevented from recovering substantial damages for breaches of covenant committed before re-entry (*g*), or from recovering arrears of rent accrued before re-entry (*h*), even if the right is to re-enter and retake the premises as if no lease had ever been made (*h*).

recover rent or damages after forfeiture.

A landlord who claims to re-enter for a forfeiture must always show that the forfeiture has been incurred even though the proof required may be of a negative character ; thus, if the breach alleged is the doing an act without his consent (*i*) ; or if the breach is non-insurance he must give some evidence that the premises were not insured (*k*). Whenever the breach alleged is the omission to do something the landlord must give some negative evidence of that omission (*l*).

Landlord must always prove breach.

By the Conveyancing Act, 1881 (*m*), a right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, is not enforceable, by action or otherwise, unless and until the lessor serves on the lessee a certain notice, and the lessee fails to comply therewith (*n*). There are, however, some exceptions to this provision requiring notice to be given before enforcing a forfeiture, and notice need not be given when the forfeiture is for: (1) non-payment of rent (*o*) ; (2) breach of covenant not to assign, underlet,

Restrictions on right of re-entry imposed by Conveyancing Act, 1881.

(*g*) *Davies v. Underwood*, 2 H. & N. 570 ; *Selby v. Browne*, 7 Q. B. 620.

(*h*) *Hartshorne v. Watson*, 4 B. N. C. 178.

(*i*) *Toleman v. Portbury*, L. R. 6 Q. B. 245.

(*k*) *Doe v. Whitehead*, 8 A. & E. 571 ; *Toleman v. Portbury*, *supra*.

(*l*) *Doe v. Robson*, 2 C. & P. 245 ; *Doe v. Watt*, 8 B. & C. 308.

(*m*) 44 & 45 Vict. c. 41.

(*n*) S. 14, sub-s. 1.

(*o*) S. 14, sub-s. 8.

part with the possession of, or dispose of the land leased (*p*);  
(3) on the bankruptcy of the lessee, or the taking in  
execution of his interest, with certain exceptions (*q*);  
(4) breaches of certain covenants in mining leases (*p*).

This subject is fully dealt with in the chapter on  
relief (*r*).

(*p*) S. 14, sub-s. 6.

55 & 56 Vict. c. 13, s. 2, sub-s. 2.

(*q*) Conveyancing Act, 1892,

(*r*) *Post*, p. 116.

## CHAPTER VIII.

## BREACHES OF COVENANTS AND CONDITIONS.

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|--|--|
| 1. <i>Non-payment of Rent</i> , 71             | 8. <i>Bankruptcy</i> , 100.              |
| 2. <i>Alienation</i> , 77.                     | 9. <i>Building Covenants</i> , 101.      |
| 3. <i>Non-repair</i> , 82.                     | 10. <i>Residence</i> , 102.              |
| 4. <i>User of the Premises</i> , 88.           | 11. <i>To buy Goods of Lessor</i> , 102. |
| 5. <i>Waste</i> , 92.                          | 12. <i>Farming Covenants</i> , 103.      |
| 6. <i>Non-Insurance</i> , 94.                  | 13. <i>Mining Covenants</i> , 104.       |
| 7. <i>Non-payment of Rates and Taxes</i> , 95. | 14. <i>Sundry</i> , 105                  |

1. *Non-payment of Rent.*

IF a landlord desires to recover possession of demised premises on the ground of a forfeiture for non-payment of rent, he can proceed either under the common law, or under the provisions of s. 210 of the Common Law Procedure Act, 1852 (*a*). He can in all cases proceed at common law, and *must* so proceed in cases which do not come within the provisions of the statute (*a*).

Common Law.  
C. L. P. Act,  
1852.

In no case can a landlord recover possession for non-payment of rent unless the payment of rent has been made a condition (*b*), or unless there is a proviso (*b*) giving the landlord a right to re-enter for such non-payment, and either determine the demise (*c*), or hold until the arrears are satisfied (*d*).

Condition, or  
proviso for  
re entry  
necessary.

(*a*) 15 & 16 Vict. c. 76.

(*b*) *Ante*, pp. 54—55.

(*c*) *Hill v. Kempshall*, 7 C. B.

(*d*) *Doe v. Horsley*, 1 A. & E.

766; *Doe v. Bowditch*, 8 Q. B.

973.

Default in  
payment.

Tender of  
rent at Com-  
mon Law.

Tender of  
rent under  
C. L. P.  
Act, 1852.

If the condition or proviso allows a specified number of days for payment of the rent after the day upon which it becomes due, no forfeiture can accrue for its non-payment until those days have elapsed (*e*). If the rent is reserved, "payable quarterly, and always if required in advance," the rent is always due in advance, and becomes payable upon demand at any time during the quarter, and is, therefore, in arrear as soon as it has been demanded (*f*). By the Common Law a tenant can pay his rent at any time before the expiration of the last day allowed for payment (*g*). If he, or anyone on his behalf, pays or tenders the rent to the landlord, or to his authorised agent, at any time (*h*) before the expiration of such last day either on or off the demised premises, no forfeiture will accrue (*i*); but the tenant must seek out his landlord, wherever he may be "*inter quattuor maria*," in order to pay his rent (*k*). Payment or tender at any time subsequent to such last day will not prevent a forfeiture at common law if the landlord has proceeded in the manner required by the common law (*l*). If, however, the landlord seeks to proceed under the statute (*m*), payment or tender of the rent at any time before the action is commenced prevents a forfeiture (*n*). Whether the proceedings be at common law, or under the statute, all

(*e*) *Thomson v. Field*, Cro. Jac. 499; *Thomkins v. Pincent*, 7 Mod. 97; *Doe v. Roe*, 7 C. B. 134; *Phillips v. Bridge*, L. R. 9 C. P. 48.

(*f*) *London & Westminster Co. v. L. N. W. Ry.* [1893] 2 Q. B. 49.

(*g*) *Dibble v. Bowater*, 2 E. & B. 564.

(*h*) *Burgaine v. Spurling*, Cro. Car. 283.

(*i*) *Cropp v. Hambleton*, Cro. Eliz. 48.

(*k*) *Haldane v. Johnson*, 8 Exch. 689.

(*l*) *Doe v. Shawcross*, 3 B. & C. 752

(*m*) 15 & 16 Vict. c. 76.

(*n*) *Goodright v. Norright*, 2 Wm. Black, 746; *Doe v. Shawcross*, 3 B. & C. 752.

proceedings are stayed on payment or tender of all rent and costs at any time before trial (o).

When the proceedings are at common law there must be a demand by the landlord, or his duly authorised agent, of the precise rent due and payable to save the forfeiture, on the exact day on which it so becomes payable, at the proper place of payment, and at a convenient time before sunset, and at sunset (p). If, however, the lease provides that the landlord may re-enter, although no formal demand shall have been made, or if the right to re-enter (q) is only a right to enter and hold until the arrears have been satisfied (r), the formalities of the common law need not be complied with, and no demand at all need be made. The words "being demanded," in a proviso for re-entry, dispense with the necessity for a strict common law demand, but not for a demand of some kind (s); but the words "without resorting to any legal process" do not dispense with a strict demand (t).

The landlord may make the demand in person, or by his duly authorised agent. An agent is usually authorised by power of attorney, and he must have his authority with him ready to produce to the tenant if required (u); but he need not produce it unless requested to do so (u). Perhaps it would be sufficient if the agent was authorised

(o) C. L. P. Act, 1852, s. 212; see p. 118; *Roe v. Davis*, 7 East, 363, 366.

(p) 1 Wms. Saund. (Ed. 6) 287, note (16) and (m); *Hill v. Kempshall*, 7 C. B. 975; *Molineux v. Molineux*, Cro. Jac. 144.

(q) *Umphyrey v. Dameon*, 1 Bulstr. 181; *Dormer's case*, 5 Co. Rep. 40 a; *Goodright v. Cator*, 2 Doug. 477, 486; *Doe v. Masters*, 2 B. & C. 490.

(r) *Doe v. Horsley*, 1 A. & E. 766; *Doe v. Bowditch*, 8 Q. B. 973; but see *Hassell v. Gouthwaite*, Willes, 500, 507.

(s) *Phillips v. Bridge*, L. R. 9 C. P. 48.

(t) *Barry v. Glover*, 10 Ir. C. L. R. 113.

(u) *Roe v. Davis*, 7 East, 363; *Toms v. Wilson*, 32 L. J. Q. B. 33, 382.

only by having a receipt for the rent signed by the landlord and duly stamped; especially if he be the known servant of the landlord, or his steward or agent who usually receives his rents.

What must  
be demanded.

The precise sum then becoming due and payable must be demanded, and not one penny more or less, otherwise the demand will be altogether bad. So, if the rent be payable quarterly, half-yearly, or yearly, only the rent becoming due for the last of such periods should be demanded, and not the previous arrears, because it is only in respect of the rent becoming due for the last period that a forfeiture will accrue, the previous arrears not having been demanded on a proper day for that purpose (y).

When demand  
must be  
made.

The rent must be demanded upon the very day upon which it becomes due and payable, if no extra days are allowed by the lease to save a forfeiture (z). If such extra days are allowed, it must be demanded upon the last of such days (a). A demand upon any other day before or after the right day is insufficient (b).

Where.

The demand must be made at the proper place. When the rent is made payable at a particular place, either on or off the premises, it must be demanded there (c). In the absence of any special provision the demand must be made upon the land (d), at the most notorious place

(y) *Scot v. Scot*, Cro. Eliz. 73 ;  
*Doe v. Paul*, 3 C. & P. 613 ;  
*Fabian v. Winston*, Cro. Eliz.  
209, 1 Wms. Saunders, (Ed. 6)  
287.

(z) *Doe v. Wandlass*, 7 T. R.  
117 ; Co. Lit. 202 a, note (3) ;  
*Umphrey v. Dameon*, 1 Bulstr.  
181.

(a) *Smith v. Bustard*, 1 Leon.

141 ; *ante*, p. 72.

(b) *Doe v. Wandlass*, 7 T. R.  
117.

(c) 4 Co. Rep. 73 a ; *Buskin v.*  
*Edmunds*, Cro. Eliz. 415 ; *Hassell*  
*v. Gowthwaite*, Willes, 500, 507 ;  
*Kidwelly v. Brand*, Plowd. 70 a.

(d) *Sweetman v. Oush*, Cro. Jac.  
8.



thereon; if there be a dwelling-house it must be made there, at the front door, though there is no necessity to enter the house (*e*); if the premises are only a wood, or land without buildings, it must be made at a gate, or on a highway running through, or other notorious place; if one place be as notorious as another the landlord may choose which he pleases (*f*). The demand must always be made, though neither the tenant nor anyone on his behalf is present (*g*), and is good in such a case, though made upon a sub-tenant, and not generally (*g*).

The demand must be made at a proper hour of the day, that is, at a convenient hour before sunset and at sunset (*h*): it may be made at any time before sunset provided it be continued until sunset (*h*); it must commence a sufficient time before sunset to allow the money to be counted and paid (*h*), or, if made by an agent, to allow the tenant to enquire into his authority (*i*). The court will not take judicial notice of the time of sunset on any particular day, but it must be proved by evidence (*k*).

Time for  
making  
demand.

By s. 210 of the C. L. P. Act, 1852 (*l*), a landlord may proceed to recover possession of the premises from his tenant under its provisions when he has by law a right to re-enter, and one half-year's rent is in arrear, and there is no sufficient distress to be found upon the premises countervailing the arrears then due (*l*).

Proceedings  
under C. L. P.  
Act, 1852.

This enactment is only applicable to cases between

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| ( <i>e</i> ) Co. Lit. 201 b.                   | <i>Doe v. Paul</i> , 3 C. & P. 613.              |
| ( <i>f</i> ) Co. Lit. 202 a.                   | ( <i>i</i> ) <i>Toms v. Wilson</i> , L. J. 32    |
| ( <i>g</i> ) <i>Doe v. Brydges</i> , 2 D. & R. | Q. B. 33, 382.                                   |
| 29; Co. Lit. 201 b.                            | ( <i>k</i> ) <i>Collier v. Nokes</i> , 2 C. & K. |
| ( <i>h</i> ) 1 Wms.Saund. (Ed. 6) 287;         | 1012. See p. 235.                                |
| Co. Lit. 202 a; Plowd. 172 a;                  | ( <i>l</i> ) 15 & 16 Vict. c. 76, s. 210.        |
| <i>Acocks v. Phillips</i> , 5 H. & N. 183;     | See note ( <i>f</i> ), p. 277.                   |
| <i>Thomson v. Field</i> , Cro. Jac. 499;       |  |

landlord (*m*) and tenant. The assignee of a tenant, whether by way of mortgage (*n*), or otherwise, and also an underlessee (*o*), are tenants within its meaning.

Right by law  
to re-enter.

The landlord must have by law a right to re-enter. He has such a right whenever the payment of rent is made a condition of the lease, or there is a proviso giving him a right to re-enter if it is not paid (*p*). It must be a right to re-enter and determine the tenancy, not merely to enter and hold until the arrears are satisfied (*q*).

Half-year's  
rent in  
arrear.

There must be at least one half-year's rent in arrear at the time the action is commenced (*r*). The taking and realising of a distress which reduces the amount of arrears to less than one half-year's rent is a bar to the action (*s*); but not if it does not so reduce the arrears (*t*). If an insufficient distress is taken, but not realised, that is no bar to an action (*u*), though possession may have been kept for some time (*u*).

No sufficient  
distress.

There must be no sufficient distress to be found upon the premises countervailing the arrears then due, that is, countervailing *all* the arrears then due, whether only one half-year's rent or more (*x*). It is good *prima facie* proof of insufficiency to show that there was no sufficient distress upon any one day between the time when the rent

(*m*) See 44 & 45 Vict c. 41. s. 10, App. B, p. 358. C. 752; *Doe v. Johnson*, 1 Stark. 411.

(*n*) *Doe v. Roe*, 3 Taunt. 402; (*s*) *Cotesworth v. Spokes*, 10 C. B. N. S. 103.

*Williams v. Bosanquet*, 1 B. & B. 238. (*t*) *Brewer v. Eaton*, 3 Doug. 230.

(*o*) *Doe v. Byron*, 1 C. B. 623.

(*p*) *Ante*, p. 71.

(*q*) *Doe v. Bowditch*, 8 Q. B.

973; *Doe v. Horsley*, 1 A. & E.

766; *Barry v. Glover*, 10 Ir. C.

L. R. 113.

(*r*) *Doe v. Shawcross*, 3 B. &

(*u*) *Doe v. Johnson*, 1 Stark. 411.

(*x*) *Cross v. Jordan*, 8 Exch.

149; *Doe v. Roe*, 4 C. B. 576;

*Doe v. Roe*, 9 Dowl. 548, *contra*, overruled.

became in arrear, and when the action was commenced (y), but the tenant may rebut this by showing that there was a sufficient distress at the time the action was commenced (y).

No demand of the rent need have been made. In proceedings under this Act, service of the writ is substituted for, and is equivalent to a formal common law demand (z). Demand is unnecessary, even though the proviso for re-entry be expressed to be in case the rent is in arrear "being lawfully demanded" (a); though it may be otherwise, if there is an express covenant not to re-enter without demand (b).

Demand unnecessary.

When an action has been commenced under this Act, the forfeiture accrues from the day upon which it would have been complete at common law, had a demand been made (c).

## 2. *Not to assign, sublet, &c.*

The covenant by a tenant that he will not alienate his estate is always construed jealously to prevent the restraint from going beyond the express stipulation (d). This covenant varies in the extent to which the restraint is imposed, and each covenant must be carefully examined to see to what extent it does impose a restraint (e).

Construction of covenants not to assign, &c.

The widest covenant is that which restrains the tenant from either assigning, or sub-letting, or parting with the

Forms of such covenants.

(y) *Doe v. Fuchan*, 15 East, 286; *Wheeler v. Stevenson*, 6 H. & N. 155; post, p. 232.

(z) *Doe v. Shawcross*, 3 B. & C. 752.

(a) *Doe v. Alexander*, 2 M. S. 525; *Doe v. Wilson*, 5 B. & Ald. 363.

(b) *Doe v. Wilson*, *supra*.

(c) *Doe v. Shawcross*, 3 B. & C. 752.

(d) *Church v. Brown*, 15 Ves. 258.

(e) *Crusoe v. Bugby*, 3 Wils. 234; *Roe v. Harrison*, 2 T. R. 425; *Roe v. Sales*, 1 M. & S. 297; *Doe v. Worsley*, 1 Camp. 20; *Greenaway v. Adams*, 12 Ves. 395.

possession of the demised premises or any part thereof. This is usually modified by the addition of the words, "*without the consent of the landlord*," and often of the further words, "*such consent not to be withheld arbitrarily*," or "*in the case of a respectable and responsible person*," or some other such words (*f*).

Conveyancing Act,  
1892, s. 3.

By the Conveyancing Act, 1892, s. 3 (*g*), in all leases containing a covenant against assigning or underletting without licence there is implied a proviso, unless the lease contain provisions to the contrary, that no fine shall be payable for such licence; this proviso, however, will not prevent the lessor from recovering reasonable legal or other expenses incurred in relation to such licence. The words of the section are, "in all leases," but there is no express provision making the section applicable to leases executed before the Act, such as is contained in section 14 of the Conveyancing Act, 1881 (*h*); the inference would, therefore, seem to be that this section only applies to leases executed after the Act, and not to leases executed before the Act.

Consent  
improperly  
withheld.

Where there is a proviso that the landlord's consent is not to be arbitrarily or unreasonably withheld, or a similar proviso, and the landlord does so withhold his consent, the tenant may alienate without consent and does not thereby incur a forfeiture (*i*). Whether the consent has been improperly withheld is a question of fact to be determined

(*f*) *Hyde v. Warden*, 3 Ex. D. 72; *Harrison v. Barrow*, 63 L. T. 834; *Lehmann v. McArthur*, 3 Eq. 746; 3 Ch. 496; *Treloar v. Bigge*, L. R. 9 Ex. 151; *Leppla v. Rogers*, [1893] 1 Q. B. 31.

(*g*) 55 & 56 Vict. c. 13, s. 3. See App. B, p. 376.

(*h*) 44 & 45 Vict. c. 41, s. 14,

sub-s. 9.

(*i*) *Treloar v. Bigge*, L. R. 9 Ex. 151; *Hyde v. Warden*, 3 Ex. D. 72; *Sear v. House Co.* 16 Ch. D. 387; *Sheppard v. Hongkong Co.*, 20 W. R. 459; *Leppla v. Rogers*, [1893] 1 Q. B. 31.

in each particular case, having regard to the precise terms of the proviso (*i*).

The tenant does incur a forfeiture in such cases if he alienates without first asking the consent of his landlord, even though the consent would have been improperly withheld had it been asked and refused (*k*). Consent not asked for.

It was once considered that, in a lease to a man *and his assigns*, a general condition not to assign was void for repugnancy (*l*), but that a limited condition not to assign without consent, or not to assign to particular persons, was not void (*l*). The former part of this doctrine has, however, been denied in later cases (*m*). General condition not to alienate in lease to one and his assigns.

Sub-letting is not a breach of a covenant not to assign (*n*); but a sub-lease for the whole term amounts to an assignment, and is a breach of a covenant not to assign (*o*). If one joint tenant assigns his interest to the other that is a breach of a covenant not to assign (*p*); but if one joint tenant gives exclusive occupation to the other, that is not a breach of a covenant not to part with the possession of the premises (*q*). A deposit of the lease by way of equit- Breaches of covenant not to assign.

(*j*) *Lehmann v. McArthur*, 3 Eq. 374; 3 Ch. 496; *Harrison v. Barrow*, 63 L. T. 834; and cases in last note.

(*k*) *Barrow v. Isaacs*, [1891] 1 Q. B. 417.

(*l*) *Stukeley v. Butler*, Hob. 168, Shep. Touch. 127.

(*m*) *Dennis v. Loving*, Hardr. 424, 427; *Weatherall v. Geering*, 12 Ves. 504.

(*n*) *Crusoe v. Bugby*, 3 Wils. 234; *Kinnersley v. Orpe*, 1 Doug. 56; *Church v. Brown*, 15 Ves. 258; *Brewer v. Hill*, 2 Anstr. 413.

(*o*) *Beardman v. Wilson*, L. R.

4 C. P. 57; *Wollaston v. Hakevill*, 3 M. & Gr. 297, 323; *Parmenter v. Webber*, 8 Taunt. 593; *Pollock v. Stacy*, 9 Q. B. 1033; *Poultney v. Holmes*, 1 Str. 405; *Preece v. Corrie*, 5 Bing. 24; *Baker v. Gostling*, 1 B. N. C. 19; *Doe v. Bateman*, 2 B. & Ald. 168; *Thorn v. Woolcombe*, 3 B. & Ad. 586; *Holford v. Hatch*, 1 Doug. 183.

(*p*) *Varley v. Coppard*, L. R. 7 C. P. 505; see remarks on this case in *Bristol v. Westcott*, *infra*.

(*q*) *Bristol v. Westcott*, 12 Ch. D. 461.

able mortgage (*r*) ; an assignment which becomes void as an act of bankruptcy (*s*), or which is void for not being by deed (*t*) ; a mere contract to assign or sublet (*u*) ; or an advertisement of intention to assign (*x*), are not breaches of a covenant not to assign.

Breaches of  
covenant not  
to sublet.

A letting from year to year is a breach of a covenant not to *underlease* (*y*). A covenant not to assign, grant, or dispose of the premises for a longer period than one year, is not broken by a letting for one year, and before its expiration, a letting for the next year to another person, provided the leases *in futuro* are made *bond fide* and not for the purpose of evading the covenant (*z*).

Breaches of  
covenant  
not to part  
with pos-  
session.

To give exclusive occupation of any part of the premises to another person is a breach of a covenant not to part with possession of any part of the demised premises (*a*). In one case, however, Lord Ellenborough held that it was no breach of such a covenant to take in a lodger (*b*). This case can only be reconciled with the later cases by assuming that the lodger had not exclusive occupation of any part of the premises (*c*).

Alienation  
by operation  
of law, or  
compulsion.

Alienation by operation or compulsion of law, or by will, is no breach of a covenant against alienation. Therefore, if the term is taken in execution (*d*), or vests in the tenant's trustee in bankruptcy (*e*), or is taken under com-

(*r*) *Doe v. Bevan*, 3 M. & S. 353 ; *Ex parte Drake*, 1 M. D. & De G. 539 ; *Doe v. Hogg*, 4 D. & R. 226.

(*s*) *Doe v. Powell*, 5 B. & C. 308.  
(*t*) 8 & 9 Vict. c. 106, s. 3.

(*u*) *Williams v. Cheney*, 3 Ves. 59.

(*x*) *Gourlay v. Somerset*, 1 V. & B. 68.

(*y*) *Timms v. Baker*, 49 L. T. 106.

(*z*) *Croft v. Lumley*, 6 H. L. C.

672.

(*a*) *Roe v. Sales*, 1 M. & S. 297 ; *Greenslade v. Tapscott*, 1 C. M. & R. 59.

(*b*) *Doe v. Laming*, 4 Camp. 73, 77.

(*c*) *Greenslade v. Tapscott*, 1 C. M. & R. 55, 59.

(*d*) *Doe v. Carter*, 8 T. R. 57, 301.

(*e*) *Weatherall v. Geering*, 12 Ves. 504 ; *Doe v. Smith*, 5 Taunt. 795.

pulsory powers (*f*), or passes to executors (*g*) or administrators (*g*), no forfeiture is incurred (usually there is an express proviso for forfeiture on bankruptcy or on the term being taken in execution (*h*)). But if the taking in execution of the term has been intentionally brought about by the tenant for the purpose of effecting an alienation, that is a breach of the covenant (*i*). So also is an assignment for the benefit of creditors generally, unless avoided as an act of bankruptcy (*k*). Compulsory alienation does not entirely destroy the condition not to alienate, and subsequent voluntary assigns are bound by it (*l*).

If the covenant or proviso extends in terms to the lessee only, assigns by operation of law are not bound by it, and may assign without incurring a forfeiture (*m*). If executors or administrators are expressly named, they are bound (*n*); they are also included in the word "assigns" (*o*). If "assigns" are named, then assigns by operation of law are bound (*p*), unless they are compelled to alienate by order of court (*q*), or by statute (*r*).

How far  
assigns by  
operation of  
law are  
bound.

(*f*) *Slipper v. Tottenham Ry.* Co. 4 Eq. 112; *Baily v. De Crespigny*, L. R. 4 Q. B. 180; see *Doe v. Rugeley*, 6 Q. B. 107.

(*g*) *Doe v. Bevan*, 3 M. & S. 353; *Roe v. Harrison*, 2 T. R. 425; *Philpot v. Hoare*, 2 Atk. 219; *Fox v. Swann*, Styles 482; *Herry v. Taunton*, Cro. Eliz. 331; *Dumpor's case*, Cro. Eliz. 816; *Shep. Touch.* 144.

(*h*) See *post*, p. 100.

(*i*) *Doe v. Carter*, 8 T. R. 57, 301; *Doe v. Hawke*, 2 East, 481.

(*k*) *Holland v. Cole*, 1 H. & C. 67.

(*l*) *Winter v. Dumergue*, 14 W. R. 281, 699.

W. Y. E.

(*m*) *Seers v. Hind*, 1 Ves. 294; *Cox v. Brown*, Cha. Rep. 170; *Doe v. Smith*, 5 Taunt. 795; *Philpot v. Hoare*, 2 Atk. 219, note.

(*n*) *Roe v. Harrison*, 2 T. R. 425.

(*o*) *Wollaston v. Hakewill*, 3 M. & Gr. 297; *Smallpiece v. Evans*, 1 Anders. 123; *Buckley v. Pirk*, 1 Salk. 316.

(*p*) *Philpot v. Hoare*, 2 Atk. 219; *More's case*, Cro. Eliz. 26; *Goring v. Warner*, 7 Vin. 85.

(*q*) *Doe v. Bevan*, 3 M. & S. 353.

(*r*) *Doe v. Carter*, 8 T. R. 57, 301.

3. *Covenant to Repair.*

Meaning of  
covenant to  
repair.

The covenant to repair is an agreement, between landlord and tenant, that the tenant shall do all repairs which are requisite during the continuance of the tenancy, which otherwise would have to be done by the landlord, if done at all (s).

Effect.

This covenant is, in different leases, expressed in many different ways, but the effect seems to be generally the same, whatever form of words may be used. Covenants "to repair," "to repair and keep in repair," to keep in "good," "sufficient," "habitable," "tenantable," or "necessary" repair, all have the same effect, that is, they oblige the tenant to do all requisite repairs having first put the premises in repair (t). The tenant is bound, under his general covenant to repair, to *put* the premises in repair, whether he has so expressly agreed or not (u).

Extent of  
liability.

Having regard to the age, class, general condition, and locality of the premises at the time of the demise the tenant is bound to keep them in such a state of repair that they may be used and dwelt in, not only in safety, but also with reasonable comfort by the class of persons by whom, and for the sort of purposes for which, they were to be occupied (x).

(s) *Truscott v. Diamond Co.*, 20 Ch. D. 251.

(t) *Gutteridge v. Munyard*, 1 Moo. & R. 334; *Belcher v. McIntosh*, 8 C. & P. 720; *Truscott v. Diamond Co.*, *supra*; and cases in the two following notes.

(u) *Payne v. Haine*, 16 M. & W. 541; *Easton v. Pratt*, 2 H. & C. 676, 687; *Saner v. Bilton*, 7 Ch. D. 815; *Truscott v. Diamond Co.*, *supra*; *Proudfoot v. Hart*, 25

Q. B. D. 42; but see *Shaw v. Kay*, 1 Exch. 412.

(x) *Johnson v. Hereford*, 4 A. & E. 520; *Stanley v. Towgood*, 3 B. N. C. 4; *Mantz v. Goring*, 4 B. N. C. 451; *Scales v. Lawrence*, 2 F. & F. 289; *Woolcock v. Dew*, 1 F. & F. 337; *Burdett v. Withers*, 7 A. & E. 136; *Walker v. Hatton*, 10 M. & W. 249; *Cooke v. Cholmondeley*, 4 Drew. 326; *Haldane v. Newcomb*, 12 W. R. 135;



Old buildings must be kept in repair as old buildings, and the tenant is not bound to do them up like new buildings (y). The tenant is not bound to make good any decay of the general structure caused by the operation of time and nature (z); he is only bound, by seasonable applications of time and labour, to keep the premises as nearly as possible in the same condition as when they were demised (z). This is the rule, although he may have covenanted to keep them in as good plight as they were at the time of the demise (a). If, however, he has agreed to repair and to *rebuild*, if necessary, he is bound to keep the premises in perfect repair during the whole term, whatever may have been their age and general condition at the time of the demise (b).

The class to which the premises belong must be considered, for premises usually occupied by one class of tenants may not require the same character of repairs as those usually occupied by a different class (c). Also the *general* condition of the premises at the time of the demise must be looked at (d), not taking into account any particular defects of repair existing at that time (e).

*Payne v. Haine*, 16 M. & W. 520.

541; *Soward v. Leggatt*, 7 C. & P. 613; *Saner v. Bilton*, *supra*; *Proudfoot v. Hart*, *supra*.

(y) *Gutteridge v. Munyard*, 1 Moo. & R. 334; *Scales v. Lawrence*, *supra*; *Harris v. Jones*, 1 Moo. & R. 173; *Lister v. Lane*, [1893] 2 Q. B. 212.

(z) *Gutteridge v. Munyard*, *supra*; *Proudfoot v. Hart*, 25 Q. B. D. 42; *Lister v. Lane*, *supra*.

(a) Fitz. Abr. tit. Covenant fol. 4; *Shep. Touch.* 169; *Johnson v. Hereford*, 4 A. & E.

(b) *Doe v. Rowlands*, 9 C. & P. 734; *Doe v. Withers*, 2 B. & Ad. 896; *Loader v. Kemp*, 5 C. & P. 375; *Truscott v. Diamond Co.*, 20 Ch. D. 251.

(c) *Belcher v. McIntosh*, 8 C. & P. 720; *Saner v. Bilton*, 7 Ch. D. 815; *Proudfoot v. Hart*, 25 Q. B. D. 42.

(d) *Burdett v. Withers*, 7 A. & E. 136; *Walker v. Hatton*, 12 M. & W. 249.

(e) *Mantz v. Goring*, 4 B. N. C. 451.

Performance  
of the cove-  
nant.

The covenant to repair is performed if the tenant keeps the premises *substantially* in repair, and does all that he reasonably ought to do in performance of his covenant (*f*); it is always a question of fact whether he has done so (*g*). Even if the tenant has agreed to repair to the satisfaction of the landlord's surveyor, the jury may find that the state of repair ought to have satisfied the surveyor (*h*). It is not sufficient for the tenant to have employed competent persons to do the repairs if they have not in fact executed them properly (*i*).

Time to be  
allowed.

If the premises are out of repair at any time during the term the covenant is broken (*k*). A tenant must, however, be allowed a reasonable time to put the premises into repair at the commencement of the tenancy (*l*), even if he has covenanted to do so "forthwith" (*m*), or "immediately" (*n*); and also to execute repairs during the tenancy, unless they are rendered necessary by his own default. If the tenant positively refuses to repair the landlord may proceed to enforce the forfeiture without waiting for such reasonable time to elapse (*n*).

Premises  
destroyed by  
fire, &c.

A tenant is bound by his covenant to repair though the premises are burnt down by accident or negligence (*o*), or

(*f*) *Evelyn v. Raddish*, 7 Taunt. 411; *Harris v. Jones*, 1 Moo. & R. 173; *Stanley v. Towgood*, 3 B. N. C. 4; *Doe v. Sutton*, 9 C. & P. 706.

(*g*) *Doe v. Sutton*, *supra*.

(*h*) *Doe v. Jones*, 2 C. & K. 743; *Parson v. Sexton*, 4 C. B. 899, 909; *Moore v. Woolsey*, 4 E. & B. 243, 252, 256.

(*i*) *Nokes v. Gibbon*, 3 Drew. 681.

(*k*) *Luxmore v. Robson*,<sup>1</sup> 1 B. & Ald. 584.

(*l*) *Green v. Eales*, 2 Q. B. 225; *Coward v. Gregory*, L. R. 2 C. P. 153.

(*m*) *Doe v. Sutton*, 9 C. & P. 706; *Burgess v. Batifeur*, 7 M. & Gr. 481, 494; *Roberts v. Brett*, 11 H. L. C. 337.

(*n*) *Green v. Eales*, 2 Q. B. 225.

(*o*) *Bullock v. Dommitt*, 6 T. R. 650; *Chesterfield v. Bolton*, 2 Comyn. 627; *Digby v. Atkinson*, 4 Camp. 275; *Clark v. Glasgow Co.*, 1 Macq. 668; *Gregg v. Coates*, 23 Beav. 33.

blown down by a tempest (*oo*), or destroyed by other inevitable accident (*p*), unless the covenant contains an exception in those cases (*q*). The fact that the landlord has insured and received compensation does not release the tenant from such liability (*r*).

Non-repair caused, not by the acts or neglect of the tenant but by other persons in pursuance of statutory powers, is not a breach of the covenant to repair (*s*). The tenant is, however, liable for the acts of a third person not having statutory powers (*t*). Non-repair caused by third person.

It is often a difficult question to decide whether a covenant to repair extends to buildings which have been erected upon the premises subsequently to the demise. No general rule can be laid down, but the question must be determined upon the particular words of each covenant. The authorities seem to establish these rules, that where there is a perfectly general covenant to repair and keep in repair the inference is that the tenant covenants to repair subsequently erected buildings (*u*); but that, where the tenant covenants to repair and keep in repair *the demised premises* (*x*), no such liability arises (*u*). Subsequently erected buildings.

Sometimes there is a condition precedent to be performed before the tenant becomes liable under a covenant to repair. In those cases there can be no breach by the tenant until the condition has been performed. For Conditions precedent to liability.

(*oo*) See note (*o*) previous page.

(*p*) Shep. Touch. 173.

(*q*) *Saner v. Bilton*, 7 Ch. D. 815; *Manchester Co. v. Carr*, 5 C. P. D. 507; *Meath v. Cuthbert*, Ir. R. 10 C. L. 395.

(*r*) *Leeds v. Cheetham*, 1 Sim. 146; *Lofft v. Dennis*, 1 E. & E. 474.

(*s*) *Moore v. Clark*, 5 Taunt. 90; *Green v. Eales*, 2 Q. B. 225.

(*t*) *Borgnis v. Edwards*, 2 F. & F. 111.

(*u*) *Cornish v. Cleife*, 5 H. & C. 446; *Hudson v. Williams*, 39 L. T. 632; *White v. Wakley*, 26 Beav. 16; *Doe v. Rowlands*, 9 C. & P. 734; *Douse v. Earle*, 3 Lev. 264; *Penry v. Brown*, 2 Stark. 403; *Beaufort v. Bates*, 3 De G. F. & J. 381.

(*x*) *Cornish v. Cleife*, *supra*.

instance, if the landlord has agreed to previously put the premises into repair (*y*), or to supply materials for repairs (*z*), or to appoint a surveyor to see that the repairs are properly done (*a*), those conditions must be performed before the tenant is liable for non-repair. If the landlord only agrees that the tenant may take sufficient wood from the demised land, it is not a condition precedent that there shall be sufficient wood upon the land (*b*). If the landlord is ready and willing to perform his part, but the tenant refuses to repair, that is sufficient performance of the condition precedent (*c*).

If the landlord perform the condition precedent as to part only of the premises, the tenant is not bound to repair that part (*d*); the condition is indivisible, unless, perhaps, where the covenant relates to separate and distinct premises, and the landlord performs the condition as to one part (*d*).

Where the tenant had covenanted to complete buildings within a certain time, and also to keep them in repair, he was held liable under the latter covenant though he had never performed the former (*e*).

Pulling down  
or altering  
premises.

It is a breach of the covenant to repair to pull down the premises either wholly or partially, or to open new doors or windows, or to make any alterations (*f*). If, however,

- |   |   |
|---|---|
| ( <i>y</i> ) <i>Neale v. Ratcliff</i> , 15 Q. B. 661.   | ( <i>d</i> ) <i>Neale v. Ratcliff</i> , 15 Q. B. 916.   |
| 916; <i>Slater v. Stone</i> , Cro. Jac. 645; <i>Coward v. Gregory</i> , L. R. 2 C. P. 153, 172. | ( <i>e</i> ) <i>Bennett v. Herring</i> , 3 C. B. N. S. 370.   |
| ( <i>z</i> ) <i>Thomas v. Cadwallader</i> , Willea, 496.  | ( <i>f</i> ) <i>Gange v. Lockwood</i> , 2 F. & F. 115; <i>Doe v. Jackson</i> , 2 Stark. 293; <i>Doe v. Bird</i> , 6 C. & P. 195; 7 id. 6; <i>Maunsell v. Hort</i> , 1 L. R. Ir. 88. |
| ( <i>a</i> ) <i>Coombe v. Green</i> , 11 M. & W. 480.   |   |
| ( <i>b</i> ) <i>Bristol v. Jones</i> , 1 E. & E. 484.   |   |
| ( <i>c</i> ) <i>Martyn v. Clue</i> , 18 Q. B.   |   |

the lease contemplates the making of improvements by the tenant, it is not a breach of the covenant to repair to make such improvements, though the premises are thereby altered (*g*).

The removal of fixtures erected by the tenant during the term at any time is a breach of the covenant to repair (*h*), unless they are such as a tenant is allowed by law to remove. Neglecting to paint the interior when necessary is a breach of the covenant to repair (*i*).

Removing  
fixtures.

Painting.

It is sufficient proof of a breach of a covenant to repair if the landlord shows that the premises were out of repair a short time before he elected to enforce the forfeiture. The onus is then upon the tenant to show that the premises were in repair at the time when the landlord did so elect (*k*).

Proof of want  
of repair at  
time of  
forfeiture.

Covenants to repair, and to repair after notice, are usually distinct and independent covenants, though there may be in particular cases one indivisible covenant only. Where the covenants are distinct, the landlord may proceed for a breach of either (*l*), but, if he has given a notice to repair within the time specified by the covenant to repair after notice, he is precluded from proceeding to eject under the general covenant to repair until the expiration of the specified time (*l*). Where there is but one indivisible covenant, he must give notice before he can proceed (*m*). The

Notice to  
repair.

(*g*) *Doe v. Jones*, 4 B. & Ad. 128; *Doherty v. Allman*, 3 App. Cas. 709, 731; *McIntosh v. Pontypridd Co.*, 61 L. J. Q. B. 164.

(*h*) *Penry v. Brown*, 2 Stark. 403; *Thresher v. East London Co.*, 2 B. & C. 608; *Naylor v. Collinge*, 1 Taunt. 19.

(*i*) *Monk v. Noyes*, 1 C. & P. 265.

(*k*) *Doe v. Durnford*, 2 C. & J. 667.

(*l*) *Baylis v. Le Gros*, 4 C. B. N. S. 437; *Roe v. Paine*, 2 Camp. 520; *Doe v. Meux*, 4 B. & C. 606; *Few v. Perkins*, L. R. 2 Ex. 92; see pp. 110, 130.

(*m*) *Horsefall v. Testar*, 7 Taunt. 385.

notice to repair must be given to the lessee or his assigns, and not be served upon a mere undertenant or left upon the premises unless the lease so provides (n).

If the right of re-entry is reserved upon "wilful non-repair," no notice to repair is necessary to make the non-repair "wilful"; it is "wilful" if it exists to the knowledge of the tenant (o).

Covenant to  
repair in  
underlease.

A covenant to repair contained in an underlease, though identical in terms with that in the original lease, does not necessarily have the same effect, because the age and condition of the premises may be different (p).

#### 4. *User of the Premises.*

Covenants as  
to user.

A covenant restricting the purposes for which the demised premises may be used is very frequently inserted in leases, especially in those of houses. The object is to prevent the lowering of the tenement in the scale of houses by their user for those purposes which, in the judgment of the lessor, are likely to be a nuisance to the neighbourhood, or to prevent tenants from afterwards taking the premises, and may therefore depreciate their value at a future period (q).

Business or  
trade.

A covenant to use the premises as a private *dwelling-house* only, and a covenant not to carry on any *business* upon the premises, are the same in effect; but a covenant not to carry on any *trade* upon the premises is more limited in its restriction. Every trade is a business, but every business is not necessarily a trade (r). *Business* is

Business.

(n) *Sweetman v. Cush*, Cro. Jac. W. 249.

8. (q) *Doe v. Spry*, 1 B. & Ald. 617.

(o) *Doe v. Morris*, 11 L. J. Ex. 313.

(r) *Doe v. Bird*, 2 A. & E. 161.

(p) *Walker v. Hatton*, 10 M. &

something which is diverse from ordinary domestic life (*s*); the occupation or calling of a person is his business (*t*). To constitute a business it is not necessary that it should be carried on with the object of making a profit (*u*), nor that the person said to be carrying on business should take payment (*x*). Payment, however, does not necessarily make that a business which otherwise would not be so (*x*). *Trade* is business which is carried on by buying and Trade. selling (*y*).

Charitable institutions, such as homes (*z*) and hos- Instances. pitals (*a*), schools, whether boarding or day schools (*b*), lunatic asylums (*c*), and offices (*d*), are *businesses*, but not *trades*, and are breaches of a covenant to use as a private dwelling-house only, or not to carry on any business. It is no breach of such a covenant to hold an auction upon the premises of the furniture belonging to them (*e*).

The covenant may be directed only against offensive trades or businesses; or against such as may be a nuisance or annoyance to the lessor, or to the neighbourhood; or against particular trades or businesses. Whether a trade or business is offensive depends much upon the situation of the premises (*f*). Probably any trade or business

Offensive or  
annoying  
trades or  
businesses.

(*s*) *Rolls v. Miller*, 25 Ch. D. 206; 27 *Id.* 71. *Heatley v. Benham*, 40 Ch. D. 80.

(*t*) *Portman v. Home Hospital*, 27 Ch. D. 81 note. (*b*) *Doe v. Keeling*, 1 M. & S. 95; *Kemp v. Sober*, 1 Sim. N. S. 517; *Wickenden v. Webster*, 6 E. & B. 387; *Johnstone v. Hall*, 2 K. & J. 414.

(*u*) *Bramwell v. Lacy*, 10 Ch. D. 691; and two last cited cases. (*c*) *Doe v. Bird*, 2 A. & E. 161.

(*x*) *Rolls v. Miller*, *ubi supra*.

(*y*) *Doe v. Bird*, *supra*.

(*z*) *Rolls v. Miller*, *supra*; *German v. Chapman*, 7 Ch. D. 271. (*d*) *Wilkinson v. Rogers*, 10 Jnr. N. S. 5, 162.

(*e*) *Reeves v. Cattell*, 24 W. R. 485.

(*a*) *Bramwell v. Lacy*, 10 Ch. D. 691; *Portman v. Home Hospital*, 27 Ch. D. 81 note; *Tod* (*f*) *Gutteridge v. Munyard*, 7 C. & P. 129.

which was carried on upon the premises at the time of the demise, is not offensive within the meaning of the covenant (*f*). The trade of a licensed victualler is not offensive (*g*); nor is that of a warehouse for storing dangerous articles such as matches (*h*). Nuisance has a legal signification, and means a public, not a mere private annoyance (*i*). A school of any kind is not a nuisance (*k*). "Annoyance" has a wider meaning than "nuisance," for it means anything which reasonably troubles the mind and pleasure of an ordinary sensible inhabitant, though it may not amount to physical detriment to comfort, or involve pecuniary loss (*l*).

Selling beer, wine, or spirits "not to be drunk upon the premises," is not user as a public-house (*m*), or as a beer-house (*n*); but it is user as a beershop whenever beer is sold (*o*); and is user "for the sale of wine or spirits," when those articles are sold (*p*). There is a distinction between a beerhouse and a beershop; the former means a place where drink is consumed upon the premises (*q*). The trade of a retail brewer is not the trade of "a common brewer or retailer of beer" (*r*). A *vintner* is one who

User as  
public-house,  
&c.

- (*f*) See last note.  
 (*g*) *Jones v. Thorne*, 1 B. & C. 715.  
 (*h*) *Hickman v. Isaacs*, 4 L. T. 285.  
 (*i*) *Harrison v. Good*, 11 Eq. 338; but see *Tod Heatley v. Benham*, 40 Ch. D. 80.  
 (*k*) *Harrison v. Good*, 11 Eq. 338.  
 (*l*) *Tod Heatley v. Benham*, 40 Ch. D. 80.  
 (*m*) *Pease v. Coats*, 2 Eq. 688.  
 (*n*) *L. & N. W. R. v. Garnett*, 9 Eq. 26; *Holt v. Collyer*, 16 Ch. D. 718.  
 (*o*) *St. Albans v. Battersby*, 3 Q. B. D. 359; *London & Suburban Land Co. v. Field*, 16 Ch. D. 645; *Nicoll v. Fenning*, 19 Ch. D. 258.  
 (*p*) *Feilden v. Slater*, 7 Eq. 523; but see *Jones v. Bone*, 9 Eq. 674; *Buckle v. Fredericks*, 44 Ch. D. 244; *Thornevell v. Johnson*, 50 L. J. Ch. 641; *Stuart v. Diplock*, 43 Ch. D. 343, 351.  
 (*q*) *Holt v. Collyer*, 16 Ch. D. 718.  
 (*r*) *Simons v. Farren*, 1 B. N. C. 126, 272.



sells wine generally, not merely one who sells wine to be consumed upon the premises (s). A tavern is not a shop (t).

A covenant "not to do or permit any act that can or may affect a lessee, or make void the licences of a public-house is not broken by the tenant being twice convicted under the Licensing Acts, such convictions not being indorsed upon the licences (u), though it is broken if the convictions are indorsed on the licence (x).

Covenants relating to public-houses.

If it is disputed whether the tenant is really carrying on a prohibited trade or business, it is a question of fact whether he is substantially doing so or not (y). A covenant "not to use the premises otherwise than as a post office," is not broken by user for purposes analagous to those of a post office (z). A covenant "to use only for the maintenance and support of the poor," is not broken by letting the premises, and applying the rents in aid of the poor rates (a). To put up blinds and a door-plate notifying a business, is a breach of a covenant "not to affix any outward mark or show of business upon the premises" (b). A covenant not to carry on any offensive trade upon premises covenanted to be built, but to use them as a private dwelling-house only, is not broken by the erection of a circus not actually used as such (c). A covenant not

Question of fact whether covenant substantially broken.

Instances.

(s) *Wells v. Attenborough*, 24 L. T. 312.

(t) *Coombs v. Cook*, 1 C. & E. 75.

(u) *Wooler v. Knott*, 1 Ex. D. 124, 265; *Fleetwood v. Hull*, 23 Q. B. D. 35.

(x) *Harman v. Rees Powell*, 65 L. T. 255.

(y) *Doe v. Spry*, 1 B. & Ald. 617; *Lumley v. Metropolitan*

*Railway*, 34 L. T. 774; *Doe v. Elsam*, Moo. & M. 189; *Fitz v. Iles*, [1893] 1 Ch. 77; *Buckle v. Fredericks*, 44 Ch. D. 244.

(z) *Wadham v. Postmaster-General*, L. R. Q. B. 644.

(a) *Doe v. Rugeley*, 6 Q. B. 107.

(b) *Evans v. Davis*, 10 Ch. D. 747.

(c) *Worsley v. Swann*, 51 L. J. Ch. 576.

to use a house for any art, trade, or business, is broken by teaching music and singing on the premises (*d*); a covenant not to carry on certain specified trades, or do anything to annoy the lessor, or the neighbourhood, is broken by the establishment of a hospital for contagious or infectious diseases (*e*); a covenant not to carry on the business of a ladies' outfitter is not broken by carrying on a hosier's business, involving the sale of articles usually sold by a ladies' outfitter (*f*); a covenant not to use a house as a coffee-house is broken by the sale of light refreshments as ancillary to the business of a tea dealer (*g*).

Continuing  
breach.

User in a manner prohibited is a continuing breach so long as such user continues (*h*). In one case it was held that there was no continuing breach, when the premises had been sub-let for a term for a prohibited user, until the expiration of the sub-letting (*i*). A covenant "to build a private house only" is of a continuous character, and a conversion of such private house after its erection into a building of a different kind is a breach (*k*).

### 5. Waste.

When for-  
feiture for  
waste.

No forfeiture is incurred for waste unless there is a condition or proviso for re-entry therefor. Formerly for-

(*d*) *Tritton v. Bankart*, 56 L. T. 306.

(*e*) *Tod Heatley v. Benham*, 40 Ch. D. 80.

(*f*) *Stuart v. Diplock*, 43 Ch. D. 343.

(*g*) *Fitz v. Iles*, [1893] 1 Ch. 77.

(*h*) *Doe v. Woodbridge*, 9 B. & C. 376; *Maunsell v. Hort*, 1 L. R. Ir. 88.

(*i*) *Griffin v. Tompkins*, 42 L. T. 359; see also *Walrond v. Hawkins*, L. R. 10 C. P. 342.

(*k*) *Bray v. Fogarty*, Ir. R. 4 Eq. 544.

feiture was incurred under the statute of Gloucester (*l*), but that statute is now inoperative (*m*).

Waste is of two kinds, commissive or voluntary, and permissive. A tenant *commits* waste if he do any act whereby the inheritance is injured, either by diminishing the value of the estate, or by increasing the burden upon it, or by impeaching the evidence of title (*n*). It is essential to waste of this kind that *damage* results in one of those ways (*o*).

Two kinds of waste.  
Voluntary waste.

It is not, however, waste, if injury to, or destruction of, the premises results from the use of them by the tenant in a reasonable and proper manner, having regard to their character and class, and to the purposes for which they were intended to be used (*p*).

It is waste to cut timber; to plough up ancient meadow land (*q*); to dig for gravel, brick, or stone, except in such pits as were open and usually dug (*r*); to open new mines (*s*); or to cut turf for sale. But to continue the working of existing mines, quarries, or pits (*t*), or to cut turf in bogs already used for that purpose, is not waste.

Instances.

(*l*) 6 Edw. I. c. 5; repealed 42 & 43 Vict. c. 59.

(*m*) 3 & 4 Will. IV. c. 27, s. 36.

(*n*) *Huntley v. Russell*, 13 Q. B. 572, 588; *Doe v. Burlington*, 5 B. & Ad. 507, 517; *Barret v. Barret*, Hetley, 345; *Doe v. Jones*, 4 B. & Ad. 126; *Moyle v. Mayle*, Owen, 66; *Maunsell v. Hort*, 1 L. R. Ir. 88.

(*o*) *Doe v. Burlington*, 5 B. & Ad. 507; *Doe v. Bond*, 5 B. & C. 855; *Doe v. Stephens*, 6 Q. B. 208; *Doherty v. Allman*, 3 App. Ca. 709.

(*p*) *Saner v. Bilton*, 7 Ch. D. 815; *Manchester Warehouse Co. v. Carr*, 5 C. P. D. 507.

(*q*) *Simmons v. Norton*, 7 Bing. 640; *Bubb v. Velverton*, 10 Eq. 465; *Phillips v. Smith*, 14 M. & W. 589.

(*r*) *Viner v. Vaughan*, 2 Beav. 466.

(*s*) *Clegg v. Rowland*, 2 Eq. 160; *D'Arcy v. Askwith*, Hobart 234.

(*t*) *Coppinger v. Gubbins*, 3 J. & Lat. 397; *Elias v. Snowden Co.*, 4 App. Ca. 454; *Bagot v. Bagot*, 32 Beav. 509.

Permissive  
waste.

Permissive waste is allowing buildings to go to ruin (*u*), or neglecting to cultivate land in a husband-like manner, according to the custom of the country (*x*). It seems that a yearly tenant is liable for permissive waste to a less extent than a tenant for years (*y*).

### 6. *Non-insurance.*

Effect of  
covenant to  
insure.

The usual covenant is that the tenant will insure, and keep insured, the premises in some office to be approved by the landlord, and that he will produce the policy and the receipts for premiums when requested so to do. A covenant to insure, however, compels a tenant to keep the premises always insured (*z*). Probably a tenant must be allowed a reasonable time to effect the insurance after he has entered into the covenant, though this will only be a very few days (*a*). If, after this, the premises, or any part thereof (*b*), are left uninsured for any time whatever (*a*), a forfeiture is incurred (*c*).

Must be per-  
formed  
strictly.

The covenant must be performed strictly according to

- (*u*) Williams, R. P. p. 110 (ed. 17); *Davies v. Davies*, 38 Ch. D. 499, 503; *Auncorth v. Johnson*, 5 C. & P. 239; *Torriano v. Young*, 6 C. & P. 8; *Ferguson v. Ferguson*, 2 Esp. 589; *White v. Nicholson*, 4 M. & Gr. 95; *Gibson v. Wells*, 1 N. R. 290; *Legh v. Hewitt*, 4 East, 154; *Powley v. Walker*, 5 T. R. 373; *Martin v. Gilham*, 7 A. & E. 540.
- (*x*) *Hutton v. Warren*, 1 M. & W. 466, 472.
- (*y*) *Yellowly v. Gower*, 11 Exch. 274; *Horesfall v. Mather*, Holt, N. P. 7, 9; see *Davies v. Davies*, 39 Ch. D. 499; *Re Cartwright*, 41 Ch. D. 532.
- (*z*) *Hyde v. Watts*, 12 M. & W. 254; *Doe v. Peck*, 1 B. & Ad. 428.
- (*a*) *Penniall v. Harborne*, 11 Q. B. 368; *Doe v. Ulph*, 13 Q. B. 204.
- (*b*) *Penniall v. Harborne*, 11 Q. B. 368.
- (*c*) *Doe v. Peck*, 1 B. & Ad. 428; *Price v. Worwood*, 4 H. & N. 512; *Doe v. Shewin*, 3 Camp. 134; *Meek v. Carter*, 4 Jur. N. S. 992; *Wilson v. Wilson*, 14 C. B. 616; but see *Doe v. Laming*, 4 Camp. 73.

its terms. The insurance must be effected in the office named in the covenant (*d*), if one is so named; or in one approved by the landlord, if the covenant so stipulates. If the insurance is to be effected in the name of the landlord, it is a breach of covenant to effect it in the joint names of the landlord and the tenant (*e*); if in the joint names of the landlord and tenant, it is a breach to effect it in the name of the tenant alone (*f*), but not to effect it in the name of the landlord alone (*g*). Breaches.

By the operation of the Act 14 Geo. 3, c. 78, a covenant to insure runs with the land wherever situate, and therefore an assignee of the reversion can take advantage of a breach of such covenant (*h*). It matters not whether the burden runs with the land, for if the condition or covenant is broken, the estate is defeated, in whomsoever it may be vested (*i*). Covenant to insure runs with land.

### 7. *Non-payment of Rates and Taxes.*

The general rule is that rates and taxes which are ordinary, that is, ordinary annual impositions, fall upon the tenant, who is liable to pay them whether he has covenanted to do so or not (*k*). There are some, however, such as land tax, tithe rent charge, sewers rates, and poors and paving rates (in certain cases) (*l*), which fall upon the landlord. In addition to these, there are extraordinary The liability to pay rates and taxes.

(*d*) *Green v. Low*, 22 Beav. 625. Ald. 1; *Ex parte Goreley, Re Barker*, 34 L. J. Bank. 1.

(*e*) *Penniall v. Harborne*, 11 Q. B. 368. (*i*) *Doe v. Peck*, 1 B. & Ad. 428. See p. 66.

(*f*) *Doe v. Gladwin*, 6 Q. B. 953. (*k*) *Davis v Burrell*, 10 C. B. 821; *Hurst v. Hurst*, 4 Ex. 571.

(*g*) *Havens v. Middleton*, 10 Hare, 641. (*l*) 32 & 33 Vict. c. 41, s. 1 (poor); 57 Geo. 3, c. xxix. (paving).

(*h*) *Vernon v. Smith*, 5 B. &

rates and taxes, such as those for permanent improvements, for which the landlord is liable (*m*).

In order to render the tenant liable to pay such annual rates, taxes, &c., as fall upon the landlord, and all the extraordinary rates and taxes, it must be shown that he has expressly undertaken to make himself liable for them. The tenant's stipulation must be carefully examined to see whether or not it includes the particular imposition. Sometimes the agreement provides that the rates and taxes, &c., shall be borne in certain proportions by the landlord and his tenant (*n*), and if this is the case the burden is divided between them.

Forfeiture  
for non-  
payment.

If the tenant has covenanted or agreed to pay the rates and taxes, whether ordinary or extraordinary, he is liable to forfeiture for not doing so if there is a proviso or condition to that effect (*o*).

Construction  
of general  
covenant.

A covenant to pay all rates and taxes, as a general rule, means all rates and taxes assessed or charged upon the lands, or payable by the tenant in respect of his occupation of the lands (*p*).

"Rates."

Rates include certain poor rates, the liability to pay which is imposed upon the landlord (*q*). Taxes include parliamentary taxes, that is taxes imposed directly by Act of Parliament (*r*) (as opposed to those levied by local bodies under statutory powers), such as land tax (*s*) and land

"Taxes."

(*m*) *Allum v. Dickinson*, 9 Q. B. D. 632.

(*n*) *Graham v. Wade*, 16 East, 29; *Watson v. Atkins*, 3 B. & Ald. 647.

(*o*) *Davis v. Burrell*, 10 C. B. 821; *Hurst v. Hurst*, 4 Exch. 571.

(*p*) *Barcroft v. Welland*, 12 L. R. Ir. 35.

(*q*) 32 & 33 Vict. c. 41, s. 1;

37 & 38 Vict. c. 54, s. 8.

(*r*) *Brewster v. Kitchell*, 1 Salk. 197; *Bradbury v. Wright*, 2 Doug. 624; *Palmer v. Earith*, 14 M. & W. 428; *Bedford Guardians v. Bedford Commissioners*, 7 Exch. 777; *Baker v. Greenhill*, 3 Q. B. 148; *Blandford v. Marlborough*, 2 Atk. 541.

(*s*) *Parish v. Sleeman*, 1 De G.

tax redemption, and whether imposed at the time, or subsequently, if of a like nature (*t*). A "parochial" or "parliamentary" rate is a rate imposed by parochial or parliamentary authorities, on persons who have no choice in the matter but must pay it whether they will or no (*u*).

A sewers rate is not a parochial or parliamentary tax (*x*), nor is a levy for an improvement by commissioners under a local act (*y*); nor is a county rate a parliamentary tax, though it may be a parochial tax (*z*); nor is land tax a parochial rate, charge, &c. (*a*), but it is a parliamentary tax (*b*), and it is within the word "outgoings" (*c*); a water rate is not within the words "impositions" or "imposed," as it is payable through the voluntary action of the person who chooses to take the water (*d*); tithe rent-charge might come under the words "outgoings" (*e*) or "charges" (*f*), but ought to be specifically mentioned.

If a tenant covenants to pay his rent without deducting rates and taxes, a subsequent statute authorizing tenants to deduct any particular rate or tax will not affect the previous covenant, unless such subsequent Act expressly

*F. & J. 326; Christ's Hospital v. Harrild*, 2 M. & Gr. 707; *Manning v. Lunn*, 2 C. & K. 13; *Amfield v. White*, Ry. & Mood. 246; *Bradbury v. Wright*, *supra*.

(*t*) *Brewster v. Kitchell*, *supra*.

(*u*) *Badcock v. Hunt*, 22 Q. B. D. 145.

(*x*) *Palmer v. Earith*, 14 M. & W. 428.

(*y*) *Bedford Guardians v. Bedford Commissioners*, 7 Exch. 777.

(*z*) *R. v. Aylesbury*, 9 Q. B. 261.

(*a*) *Waterloo Bridge v. Cull*, 28 L. J. Q. B. 70, 29 id. 10.

(*b*) *Manning v. Lunn*, 2 C. & K. 13; *Christ's Hospital v. Harrild*, 2 M. & Gr. 707.

(*c*) *Parish v. Sleeman*, 1 De G. F. & J. 326.

(*d*) *Badcock v. Hunt*, 22 Q. B. D. 145.

(*e*) *Parish v. Sleeman*, *supra*; *Jeffrey v. Neale*, L. R. 6 C. P. 240.

(*f*) *Lockwood v. Wilson*, 43 L. J. C. P. 179.

provides otherwise (*g*); and the tenant is in like manner bound by his covenant, even though a previous local act had authorized him to deduct (*h*). By the Property Tax Act (*i*), all contracts and covenants for the payment of property and income tax in full, without allowing the deductions provided for in the Act, are void.

New or  
increased  
burdens.

A covenant to pay rates, taxes, and dues, &c., then or thereafter imposed on the premises (there being none then imposed on the premises), means all rates and taxes, &c., then imposed on the tenant in respect of his occupation, and all future rates, &c., imposed on the land itself (*k*). Where the tenant is to occupy free of all deductions, with certain exceptions, and the premises are increased in value by alterations or by new buildings, the tenant can deduct, not the whole of the rates &c., but only the amount payable on the original value of the premises before the alterations (*l*); and the same rule applies where the lessor agrees to pay all present rates &c., and the tenant all fresh rates &c. (*m*). A lessee who has covenanted to indemnify his lessor against all parochial rates &c., does not get rid of his liability by assigning his lease to an ambassador, who is by a local act exempt from the payment of them, the lessor being made responsible instead (*n*).

Extraordinary  
impositions.

As regards extraordinary impositions, the liability of the tenant can only be ascertained by reference to the

(*g*) *Brewster v. Kitchell*, 1 Salk. 197; *Devonshire v. Barrow Cos.*, 2 Q. B. D. 286; *Chaloner v. Bolcklow*, 39 L. T. 134.

(*h*) *Payne v. Burridge*, 12 M. & W. 727; *Thompson v. Lapworth*, L. R. 3 C. P. 149.

(*i*) 5 & 6 Vict. c. 35, s. 103.

(*k*) *Hurst v. Hurst*, 4 Ex. 571.

(*l*) *Watson v. Horne*, 7 B. & C. 285; *Yeo v. Leman*, 2 Str. 1190; *Hyde v. Hill*, 3 T. R. 377; *Smith v. Humble*, 15 C. B. 321.

(*m*) *Graham v. Wade*, 16 East, 29; *Watson v. Atkins*, 3 B. & Ald. 647.

(*n*) *Parkinson v. Potter*, 16 Q. B. D. 152.



Acts of Parliament creating such impositions, and the terms of the covenant entered into by the tenant. The following are the chief decisions on the subject: Under the Metropolitan Management Acts, 25 & 26 Vict. c. 102, s. 96, and 18 & 19 Vict. c. 120, s. 105, cost of paving by vestry (*o*); under 18 & 19 Vict. c. 120, cost of drainage works (*p*); under the Public Health Act, 38 & 39 Vict. c. 55, s. 94, and the Public Health (London) Act, 54 & 55 Vict. c. 76, cost of abating a nuisance (*q*); under 38 & 39 Vict. c. 55, s. 150, cost of sewerage (*r*); under 11 & 12 Vict. c. 63, cost of sewerage and levelling (*s*); under 29 & 30 Vict. c. 90, s. 10, cost of drainage (*t*); under Manchester Improvement Act, 14 & 15 Vict. c. 119, cost of sewerage and paving (*u*); under the Nuisance Removal Act, 18 & 19 Vict. c. 121, s. 19, cost of abating a nuisance (*x*); under 14 Geo. 3, c. 78, s. 41, cost of building a party wall (*y*); under 6 Geo. 4, c. 133, s. 33, cost of paving (*z*); under the Water Clauses Act, incorporated in New River Company's Act, 15 & 16 Vict. c. 150, s. 3, water rate when

(*o*) *Aldridge v. Ferne*, 17 Q. B. D. 212, lessee liable; *Allum v. Dickinson*, 9 Q. B. D. 632, lessee not liable; *Wilkinson v. Collyer*, 13 Q. B. D. 1, lessee liable; *Thompson v. Lapworth*, L. R. 3 C. P. 149, lessee liable; *Batchelor v. Bigger*, 60 L. T. 416, lessee liable.

(*p*) *Sweet v. Seagar*, 2 C. B. N. S. 119, lessee liable; *Home Stores v. Todd*, 63 L. T. 829, lessee not liable.

(*q*) *Rawlins v. Briggs*, 3 C. P. D. 368, lessee not liable; *Budd v. Marshall*, 5 C. P. D. 481, lessee liable; *Smith v. Robinson*, [1893] 2 Q. B. 53, lessee liable.

(*r*) *Hill v. Edward*, 1 C. & E. 481, lessee not liable.

(*s*) *Hartley v. Hudson*, 4 C. P. D. 367, lessee liable.

(*t*) *Crosse v. Raw*, L. R. 9 Ex. 209, lessee not liable; see *Batchelor v. Bigger*, *supra*.

(*u*) *Tidswell v. Whitworth*, L. R. 2 C. P. 326, lessee not liable.

(*x*) *Bird v. Elwes*, L. R. 3 Ex. 225, covenantor not liable.

(*y*) *Southall v. Leadbetter*, 3 T. R. 458, lessee not liable; *Barrett v. Bedford*, 8 T. R. 602, lessee liable.

(*z*) *Payne v. Burridge*, 12 M. & W. 727, lessee liable.

lessor covenanted to pay all rates (a); under an extraordinary assessment by commissioners of sewers, a sewers rate (b).

### 8. *Bankruptcy.*

Conditions  
for forfeiture  
on bank-  
ruptcy.

A proviso for re-entry may be inserted to take effect on bankruptcy (c). The filing of a petition under the Bankruptcy Act, 1883 (d), causes a forfeiture under a proviso "if the lessee become bankrupt or file a petition in liquidation" (e). The non-compliance with a debtor's summons under the Bankruptcy Act, 1869, causes a forfeiture under a proviso for forfeiture "if he shall do or permit any act or deed, matter, or thing whatsoever whereby the same shall be aliened, charged, or encumbered" (f). The execution of a declaration of insolvency on which bankruptcy ensues causes a forfeiture under a covenant "not to execute or do or suffer anything by which the effects and premises should be prejudicially affected" (g).

The bankruptcy of a surviving executor causes a forfeiture under a proviso for forfeiture "on the bankruptcy of the lessee, his executors or administrators" (h); the bankruptcy of the lessee after assignment of the lease does not cause a forfeiture under a proviso for forfeiture if "the lessee, his executors, administrators, or assigns should become bankrupt" (i); the bankruptcy of the tenant, if he is

(a) *Spanish Telegraph v. Shepherd*, 13 Q. B. D. 202, lessee liable; but see *Badcock v. Hunt*, 22 Q. B. D. 145, where lessee not liable.

(b) *Waller v. Andrews*, 3 M. & W. 312, lessee liable.

(c) *Re Tickle*, 3 M. B. R. 126; *Roe v. Galliers*, 2 T. R. 133.

(d) 46 & 47 Vict. c. 52.

(e) *Ex parte Gould*, 13 Q. B. D. 454.

(f) *Ex parte Eyston*, 7 Ch. D. 145; *Re Levy*, 30 Ch. D. 119.

(g) *Hill v. Cowdery*, 1 H. & N. 360.

(h) *Doe v. David*, 1 C. M. & R. 405.

(i) *Smith v. Gronow*, [1891] 2 Q. B. 394.

improperly made a bankrupt, does not cause a forfeiture under a proviso for forfeiture "if the tenant be duly found and declared a bankrupt" (*k*); a lease limited to continue so long as the lessee personally occupies is forfeited by bankruptcy (*l*). It seems doubtful whether the right to enforce a forfeiture on the bankruptcy of the lessee is affected by the annulment of the bankruptcy (*m*).

### 9. *Building Covenants.*

A covenant not to build beyond the building line is broken by erecting houses with bay windows projecting beyond the line (*n*). A covenant to make roads over all the premises, on which the lessee agreed to build two houses, and to contribute to the repair of the roads, is broken by making roads to the lessee's houses *only* (*o*). Under a covenant to build a house fit for a private dwelling, the lessee must not only build, but keep, the house as such (*p*). Under a covenant to rebuild on an old site the lessee need not erect the new house of the same shape and elevation as the old one (*q*). A covenant not to vary or alter the premises, or erect or make any other buildings or erections thereon, is broken by putting up wooden hoardings for advertisements (*r*). A covenant not to build any house less than £400 in value, is broken by erecting two connected together, but not substantially one house, each being worth less than £400, but together

(*k*) *Doe v. Ingleby*, 15 M. & W. 465.

(*l*) *Doe v. Clarke*, 8 East. 185.

(*m*) *Smith v. Grenow*, [1891] 2 Q. B. 394.

(*n*) *Manners v. Johnson*, 1 Ch. D. 673.

(*o*) *Mason v. Cole*, 4 Exch. 375.

(*p*) *Bray v. Fogarty*, Ir. Rep. 4 Eq. 544.

(*q*) *Low v. Innes*, 4 De G. J. & S. 286.

(*r*) *Poeock v. Gilham*, 1 C. & E. 104.

worth more (s). A covenant not to erect any buildings except dwelling-houses is not broken by the erection of an ordinary boundary wall, but is broken, if the wall is raised and a lean-to vinery placed against it (t). A covenant to build private houses of a certain value on several lots is not broken by building a stable on one lot belonging to a house on another, and in such a position that a house of the value stipulated could still be built on the plot (u).

#### 10. *Covenants as to Residence.*

A covenant to reside on the premises is broken by the lessee ceasing to occupy them (x). A covenant to occupy the premises in a proper manner is not broken by allowing a footpath to cross the land (y).

#### 11. *Covenants as to Buying Lessor's Goods.*

Where a tenant covenants with his landlord to buy all or any of his goods from him there is an implied obligation upon the part of the landlord to supply goods of a good and marketable quality, and to the amount required, and probably of any class made by the landlord; if the landlord does not fulfil such obligation, the tenant does not break his covenant by buying elsewhere (z), provided he merely confines himself to supplementing any deficiency (a).

(s) *Snow v. Whitehead*, 53 L. J. Ch. 885.

(t) *Bowes v. Law*, 9 Eq. 636; see *Child v. Douglas*, 5 De G. M. & G. 739.

(u) *Russell v. Baber*, 18 W. R. 1021.

(x) *Doe v. Clarke*, 8 East, 185; see *Doe v. Hawke*, 2 East, 481.

(y) *Doe v. Rowlands*, 9 C. & P.

734.

(z) *Thornton v. Sherratt*, 8 Taunt. 529; *Holcombe v. Hewson*, 2 Camp. 391; *Cooper v. Twibill*, 3 Camp. 286, note; *Luker v. Dennis*, 7 Ch. D. 227; *Edwick v. Hawkes*, 18 Ch. D. 199.

(a) *Wight v. Dicksons*, 1 Dow, 141.

12. *Farming Covenants.*

A covenant not to remove the manure of the farm means all manure, whether of the lessee's own cattle or that of strangers (*b*). A covenant not to sell fodder and manure in the last year of the term, means all fodder and manure on the premises during the last year, no matter when produced (*c*). A covenant to lay two sets of manure within the last six years of the term, the last to be laid within three years of the end, does not restrain the tenant from laying both sets within the last three years (*d*). A covenant not to remove hay or fodder is broken even if the hay removed is unfit for food (*e*). Under a covenant not to remove specified crops, or if removed to bring back an equivalent in manure, the tenant may remove the crops if he brings on the manure (*f*). A covenant not to sell the produce of the farm is broken by a sale of produce after the expiration of the term (*g*). A covenant to cultivate the land upon which no buildings are to be erected extends to land already built on, and afterwards cleared of buildings (*h*). A covenant to use the land in a husband-like manner according to the custom of the country, means according to the prevalent usage of the country where the lands lie (*i*). A covenant to cultivate according to the best rules of husbandry practised in the neighbourhood, is not broken by using part of a farm near London for a

(*b*) *Hindley v. Pollitt*, 6 M. & W. 529.

(*c*) *Gale v. Bates*, 3 H. & C. 84.

(*d*) *Pownall v. Moores*, 5 B. & Ald. 416.

(*e*) *Fielden v. Tattersall*, 7 L. T. 718.

(*f*) *Richards v. Bluck*, 6 C. B. 437; see *Lowndes v. Fountain*,

11 Ex. 487.

(*g*) *Massey v. Goodall*, 17 Q. B. 310.

(*h*) *Hills v. Rowland*, 4 De G. M. & G. 430.

(*i*) *Legh v. Hewitt*, 4 East, 154; *Newson v. Smythies* 1 F. & F. 477.

market garden, and erecting glasshouses thereon (*k*). A covenant not to sow more than two grain crops in the same period of four years, means any four years, and not necessarily each succeeding four years reckoning from the commencement of the term (*l*). A covenant to do team work means work for which teams are generally used, which the lessor must point out, and for which he must supply the cart (*m*). A covenant not to remove trees is broken by the removal of trees from one part of the premises to another (*n*).

Team work.

Removal of trees.

The following are some further cases on farming contracts: As to the four-course system (*o*); as to ploughing ancient meadow (*p*); as to keeping down rabbits (*q*); as to sowing every third year, and not taking three crops in succession (*r*); as to not using lands except for pasture, and user as a racecourse (*s*); as to meaning of words "turnip and fallow breaks" (*t*).

### 13. *Mining Covenants.*

Covenants in mining leases depend for their construction upon what is the intention of the parties, as shown by the particular words used in each case. The question which generally arises is whether or not the parties have entered into an unqualified absolute covenant to get a

(*k*) *Meux v. Copley*, 66 L. T. 86.

(*l*) *Fleming v. Snook*, 5 Beav. 250.

(*m*) *Doe v. Osborn*, 5 B. & S. 67.

(*n*) *Doe v. Bird*, 6 C. & P. 195.

(*o*) *Randle v. Lory*, 6 A. & E. 218.

(*p*) *Rolfe v. Peterson*, 2 Bro. P.

C. 436; *Jones v. Green*, 3 Y. & J. 298.

(*q*) *West v. Houghton*, 4 C. P. D. 197.

(*r*) *Hammond v. Colls*, 1 C. B. 916.

(*s*) *Aldridge v. Howard*, 4 M. & Gr. 921.

(*t*) *Hunter v. Miller*, 9 L. T. 159.

stipulated quantity of minerals, or to pay a stipulated amount per ton, so as to be liable for breach even though the supply fails (*u*) or the minerals can only be procured at a loss (*x*) or no minerals can be gotten at all (*y*); or whether the covenant is qualified by the insertion of words limiting the liability in case of breach (*z*); or is merely a subsidiary covenant dealing with the rate of production (*a*). Under a covenant to work in a workmanlike manner all mines which then had been or thereafter should be discovered, it is necessary that the mines be first discovered (*b*). In all cases of working mines there must be a *bond fide* working, and not a fraudulent pretence of working (*c*), and the question whether there has been a proper working is for the jury to decide on the evidence of experts (*d*). A covenant to work and keep working at all usual times, and to pay a royalty on each ton raised and made merchantable, is broken if the workmen are taken from raising the minerals and employed for any long period in making them merchantable (*e*).

#### 14. *Sundry Covenants.*

A covenant not to permit any one except a regular clergyman of the Church of England to officiate is broken

(*u*) *Bute v. Thompson*, 13 M. & W. 487; *Mellers v. Devonshire*, 16 Beav. 252; *Clifford v. Watts*, L. R. 5 C. P. 577.

(*x*) *Jervis v. Tomkinson*, 1 H. & N. 195; *Newton v. Nock*, 43 L. T. 197; *Morris v. Smith*, 3 Doug. 279.

(*y*) *Hanson v. Boothman*, 13 East, 22.

(*z*) *Foley v. Addenbrooke*, 13 M. & W. 174; *Jones v. Shears*, 4 A.

& E. 833; *Newton v. Nock*, *supra*; *Clifford v. Watts*, *supra*.

(*a*) *Clifford v. Watts*, *supra*.

(*b*) *Quarrington v. Arthur*, 10 M. & W. 335.

(*c*) *Doe v. Bancks*, 4 B. & Ald. 401.

(*d*) *Lewis v. Fothergill*, 5 Ch. App. 103.

(*e*) *Kineman v. Jackson*, 42 L. T. 80; but see *Wheatley v. Westminster Co.*, 9 Eq. 538.

if a clergyman is allowed to officiate without the necessary licence (*f*).

A covenant to make it appear by a good and certain certificate that the *cestui que vie* was living is not satisfied by a certificate from which a jury might or might not infer that he was alive (*g*).

A covenant to allow the lessor to inspect the premises at convenient times is not broken by a refusal to admit him to some rooms when he has not given notice of his coming (*h*).

A covenant by a lessee to supply and sell to the lessor lime at all times and seasons of burning lime, means the regular known seasons of burning lime, and not just when the lessee chooses to do so (*i*).

A proviso for re-entry, if the lessee be convicted of an offence against the game laws, does not create a forfeiture if the lessee be convicted of the offence of shooting without a licence (*k*).

(*f*) *Foundling Hospital v. Garrett*, 47 L. T. 230.

(*g*) *Randle v. Lory*, 6 A. & E. 218.

(*h*) *Doe v. Bird*, 6 C. & P. 195.

(*i*) *Shrewsbury v. Gould*, 2 B. & Ald. 487.

(*k*) *Stevens v. Copp*, L. R. 4 Ex. 20.



## CHAPTER IX.

## WAIVER OF FORFEITURE.

IF a landlord, when a forfeiture has been incurred for condition broken or for breach of covenant, once waives such forfeiture, he precludes himself from afterwards taking advantage of it. The common expression, "waiving a forfeiture," though sufficiently correct for most purposes, is not strictly accurate. When a lessee commits a breach of covenant upon which the lessor has a right of re-entry, he may elect to avoid or not to avoid the lease; and he may do so by deed or by word; if with notice, he says under circumstances which bind him, that he will not avoid the lease, or he does an act inconsistent with avoiding it, he elects not to avoid the lease; but if he says he will avoid it, or does an act inconsistent with its continuance, he elects to avoid it. In strictness, therefore, the question in such cases is, has the lessor, having notice of the breach, elected not to avoid the lease, or has he elected to avoid it, or has he made no election (a).

What is meant by waiver of forfeiture.

In some early cases a distinction was drawn between cases where on breach of condition or covenant the lease is to be *void*, and cases where it is only to be *voidable* (b).

Leases void on breach of condition, or voidable only.

(a) *Croft v. Lumley*, 6 H. L. C. 672, 705, per Bramwell, B. Plowd. 130; *Finch v. Throgmorton*, Cro. Eliz. 221; *Doe v. Butcher*, 1 Dougl. 50; *Mulcarry v. Eyres*, Cro. Car. 511; *Rede v. Farr*, 6 M. & S. 121.

(b) Co. Lit. 215; Anon. 3 Salk. 4; *Pennant's case*, 3 Co. Rep. 64a; *Browning & Beston's case*,

It was said that in the former case no act of the landlord could operate as a waiver of a forfeiture because the lease became void immediately upon the breach of covenant or condition (b). These cases have never been expressly overruled, but the above distinction has, at any rate, ceased to have any real importance owing to the way in which forfeiture clauses have, whenever possible, been construed by the courts in modern times (c). "In a long series of decisions the courts have construed clauses of forfeiture in leases declaring in terms, however clear and strong, that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors" (d).

What  
amounts to  
a waiver.

Any positive act done by a landlord, after a forfeiture has been incurred, with knowledge thereof, whereby he acknowledges that the tenancy existed at a date later than that on which the forfeiture was incurred, is an election by him to treat the lease as subsisting, and operates as a waiver of the forfeiture (e).

Acceptance  
of rent.

Acceptance of rent accrued due after the forfeiture is such an act (f). If rent is accepted from a person who is not the tenant, it is either equivalent to acceptance of

(b) See last note.

(c) *Doe v. Bancks*, 4 B. & Ald. 401; *Rede v. Farr*, 6 M. & S. 121; *Roberts v. Davey*, 4 B. & Ad. 664; *Arnsby v. Woodward*, 6 B. & C. 519; *Doe v. Birch*, 1 M. & W. 402; *Bowser v. Colby*, 1 Hare, 109; *Dakin v. Cope*, 2 Russ. 170; *Davenport v. Reg.* 3 App. Cas. 115; *Victoria v. Ettershank*, L. R. 6 P. C. 354; *Re Tickle*, 3 M. B. R. 126.

(d) *Davenport v. Reg.* 3 App. Cas. 115, 128. See p. 59.

(e) *Marsh v. Curteys*, Cro. Eliz. 528; *Harvie v. Onwel*, id. 553, 572; *Doe v. Rees*, 4 B. N. C. 384; *Doe v. Pritchard*, 5 B. & Ad. 765; *Pellatt v. Boosey*, 31 L. J. C. P. 281; *Price v. Worwood*, 4 H. & N. 512; *Victoria v. Ettershank*, L. R. 6 P. C. 354; *Davenport v. Reg.*, 3 App. Cas. 115; *Finch v. Underwood*, 2 Ch. D. 310; see *Ex parte Newitt*, 16 Ch. D. 522, 533.

(f) *Croft v. Lumley*, 6 H. L. C. 672; *Davenport v. Reg.*, *supra*.

rent from the tenant himself, or else is an eviction of the real tenant, and either way operates as a waiver, for the landlord cannot hold the tenant responsible for breaches of covenant occurring during the time he has kept him out of possession (*g*). Acceptance of rent, if it is paid as rent, operates as a waiver notwithstanding any protest that it is not received as rent or any declaration that it is accepted without prejudice to the right to re-enter (*h*). Acceptance of rent operates as a waiver of all forfeiture incurred up to the time such rent became due (*i*); but subsequent acceptance of rent due prior to the forfeiture is no waiver (*k*). Acceptance of rent after the day it became due, is no waiver of a forfeiture incurred by non-payment of that rent when it became due (*l*).

A distress for rent operates as a waiver of every forfeiture incurred up to the time it is made (*m*); the statute 8 Anne, c. 14, which extends the right of distress for six months after the determination of a lease, has been said not to apply to a determination by forfeiture (*n*); and, even if it did apply, the distress would not be a waiver, because the lease would not have been determined, unless the landlord had by some unequivocal act elected to avoid it, in which case no subsequent act would be a waiver (*o*). A distress is a waiver of forfeiture for non-payment of the

Distress for  
rent.

(*g*) *Pellatt v. Boosey*, *supra*; *Price v. Worwood*, *supra*.

(*h*) *Croft v. Lumley*, 5 E. & B. 648; *Davenport v. Reg.*, 3 App. Cas. 115, 131; *Griffin v. Tomkins*, 42 L. T. 359; *Strong v. Stringer*, 61 L. T. 470.

(*i*) *Pellatt v. Boosey*, 31 L. J. C. P. 281.

(*k*) *Green's case*, Cro. Eliz. 3; *Marsh v. Ourtys*, 2 Cro. Eliz. 528; *Price v. Worwood*, 4 H. &

N. 512; *Cronin v. Rogers*, 1 C. & E. 348.

(*l*) *Green's case*, *supra*.

(*m*) *Ward v. Day*, 4 B. & S. 337, 5 Id. 359; *Price v. Worwood*, 4 H. & N. 512, 515; *Doe v. Peck*, 1 B. & Ad. 428; *Doe v. Williams*, 7 C. & P. 322; *Grimwood v. Moss*, L. R. 7 C. P. 360, 363.

(*n*) *Doe v. Williams*, *supra*; *Grimwood v. Moss*, *supra*.

(*o*) *Post*, p. 113.

rent in respect of which it is made (*p*). When proceedings are taken under sect. 210 of the C. L. P. Act, 1852, an insufficient distress is not a waiver, since under that Act the landlord must prove that there was no sufficient distress upon the premises (*q*). A distress only waives forfeitures incurred up to the time it is made, and none subsequent thereto, though possession be kept under the distress (*r*). A distress made and not submitted to by the tenant, but replevied by him, is no waiver (*s*).

Other acts  
which operate  
as a waiver.

Other acts which operate as a waiver are : suing for (*t*), or making an unqualified demand of (*u*), rent accrued due subsequent to the forfeiture ; a receipt given for prior rent describing the tenant as being tenant at the time it was given (*x*) ; an allegation, in an action for damages for breach of covenant, that the breach occurred during the existence of the term (*y*) ; giving a special notice to repair in accordance with the terms of the special covenant, which waives all breaches up to the expiration of the notice (*z*), though a general notice to repair is not a waiver (*a*) ; negotiations or an agreement for a new lease or licence on the expiration of the old one in respect of

(*p*) *Green's case*, Cro. Eliz. 3 ;  
*Ward v. Day*, *supra*.

(*q*) *Brewer v. Eaton*, 3 Doug.  
230 ; *Doe v. Johnson*, 1 Stark.  
411 ; though if such distress  
reduce the rent in arrear to less  
than one half-year's rent, it will  
prevent the landlord from  
proving his case under s. 210 ;  
*Cotenworth v. Spokes*, 10 C. B. N.  
S. 103.

(*r*) *Doe v. Johnson*, *supra*.

(*s*) *Blyth v. Dennett*, 13 C. B.  
178.

(*t*) *Dendy v. Nicholl*, 4 C. B.

N. S. 376 ; *Roe v. Minshall*, B.  
N. P. 96 c.

(*u*) *Doe v. Birch*, 1 M. & W.  
402, 408 ; *Blyth v. Dennett*, 13 C.  
B. 178 ; *Dendy v. Nicholl*, *supra*.

(*x*) *Green's case*, Cro. Eliz.  
3 ; cited 1 M. & W. 406.

(*y*) *Pellatt v. Boosey*, 31 L. J.  
C. P. 281.

(*z*) *Doe v. Meux*, 4 B. & C.  
606 ; *Doe v. Lewis*, 5 A. & E.  
277.

(*a*) *Roe v. Paine*, 2 Camp. 520 ;  
*Few v. Perkins*, L. R. 2 Ex. 92.

which a forfeiture has been incurred (*b*) ; an assignment of a leasehold interest expressed to be subject to under-leases in respect of which a forfeiture had been incurred (*c*) ; advising a person to purchase the term from a tenant after forfeiture incurred (*d*) ; probably, a notice to quit, in respect of all breaches anterior to its expiration (*e*).

An eviction, actual or constructive, from the whole premises, waives all breaches committed during the continuance of the eviction (*f*) ; and an eviction from part of the premises waives all forfeiture for non-payment of rent during the continuance of the eviction (*g*).

Negotiations between a landlord and tenant, pending a notice to repair, for the purchase of the tenant's interest, which do not show an intention to abandon the notice, do not operate as a waiver of a forfeiture incurred by non-compliance with that notice (*h*). Assigning in the particulars of breaches, in an action of ejectment for forfeiture, the non-payment of rent accrued due subsequent to the forfeiture relied on, is not a waiver of that forfeiture even though the tenant has brought the rent into court (*i*). Where, however, possession was claimed on the ground of a forfeiture, and the plaintiff alleged generally that he was ready and willing to grant a lease in accordance with the terms of the agreement under which the defendant held, and asked for an injunction to restrain breaches generally,

(*b*) *Ward v. Day*, 4 B. & S. 337 ; *Doe v. Curwood*, 1 H. & W. 140.

(*c*) *Hunt v. Bishop*, 8 Exch. 675 ; *Hunt v. Remnant*, 9 Exch. 635.

(*d*) *Doe v. Eykins*, 1 C. & P. 154.

(*e*) *Gregory v. Wilson*, 9 Hare,

683, 688.

(*f*) *Pellatt v. Boosey*, 31 L. J. C. P. 281.

(*g*) *Morrison v. Chadwick*, 7 C. B. 266, 283.

(*h*) *Hughes v. Metropolitan Ry. Co.*, 1 C. P. D. 120, 135.

(*i*) *Toleman v. Portbury*, L. R. 6 Q. B. 245, 7 Id. 344.

it was held that the plaintiff had by his pleadings waived the forfeiture (*k*).

A landlord by merely lying by and not objecting to an act which creates a forfeiture does not thereby waive it; there must be some positive act on his part (*l*). In some cases, however, although what the landlord has done does not amount to a waiver of a forfeiture, yet he is estopped by his conduct from claiming to enforce a forfeiture. The rule is that where one, by his acts or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time (*m*). For instance, where a landlord has induced a tenant to lay out money or to believe that he was duly performing the covenants (*n*).

Waiver by  
crown ;  
by agent.

A forfeiture may be waived by the Crown as well as by a private individual (*o*); and by a landlord's agent, if he have sufficient authority (*p*).

Knowledge  
by landlord  
of the tor-  
feiture.

For any of the before-mentioned acts to operate as a waiver, it is essential that the landlord should be aware of the forfeiture that has been incurred (*q*), or that the for-

(*k*) *Evans v. Davis*, 10 Ch. D. 747.

(*l*) *Doe v. Allen*, 3 Taunt. 78 ; *Perry v. Davis*, 3 C. B. N. S. 769 ; *Gange v. Lockwood*, 2 F. & F. 115 ; *Schwyn v. Garfit*, 38 Ch. D. 273, 284, per Bowen, L.J.

(*m*) *Pickard v. Sears*, 6 A. & E. 469, 474.

(*n*) *Doe v. Eykins*, 1 C. & P. 154 ; *Doe v. Rowe*, 2 C. & P. 246 ; *West v. Blakeway*, 2 M. & Gr. 729 ; *Doe v. Sutton*, 9 C. & P. 706 ; and see *Doe v. Brindley*, 12

Moo. 37 ; *Ex parte Newitt*, 16 Ch. D. 522.

(*o*) *Bridges v. Longman*, 24 Beav. 27 ; *Davenport v. Reg.*, 3 App. Cas. 115 ; *Middleton v. Power*, 19 L. R. Ir. 1, 12.

(*p*) *Penniall v. Harborne*, 11 Q. B. 368, 379 ; *Doe v. Brindley*, 12 Moo. 37 ; *Doe v. Birch*, 1 M. & W. 402.

(*q*) *Pennant's case*, 3 Co. Rep. 64a ; *Duppa v. Mayo*, 1 Wms. Saund. 275d ; *Goodright v. Davis*, 2 Cowp. 803 ; *Doe v. Birch*,

feiture should be of such a nature as to be equally within the cognizance of the landlord and his tenant (*r*).

When the landlord has by some unequivocal act, such as entry or bringing an action to recover possession, shown his election to treat the lease as forfeited, no subsequent act of his can operate as a waiver (*s*). But acceptance of rent accrued due since such election is evidence of a new agreement for a tenancy upon the old terms (*t*).

No waiver  
after election  
to forfeit.

Where the breach for which a forfeiture is incurred is of a continuing nature, any act of the landlord waives only the forfeiture incurred up to the time of that act, and not any forfeiture incurred by the subsequently continuing breach (*u*).

Continuing  
breaches.

Breaches of covenants to repair (*x*), to insure or keep insured (*y*), and not to use the premises in a particular manner (*z*), are of a continuing nature. Under a proviso for re-entry "if and whenever" the rent is in arrear and there is no sufficient distress, the right to re-enter continues as long as and whenever those two conditions co-exist (*a*).

Instances.

Breaches of covenants to put into repair (*b*), to repair within a specified time after notice (*b*), of a condition

*supra*; *Roe v. Harrison*, 2 T. R. 425, 430; *Croft v. Lumley*, 5 E. & B. 648; *Walrond v. Hawkins*, L. R. 10 C. P. 342.

(*r*) *Harvis v. Onwel*, Cro. Eliz. 553, 572.

(*s*) *Jones v. Carter*, 15 M. & W. 718; *Evans v. Wyatt*, 43 L. T. 176; *Grimwood v. Moss*, L. R. 7 C. P. 360; and see *Bailey v. Mason*, 2 Ir. C. L. R. 582.

(*t*) *Doe v. Batten*, 1 Cowp. 243; *Evans v. Wyatt*, *supra*.

(*u*) *Doe v. Jones*, 5 Exch. 498; *Doe v. Woodbridge*, 9 B. & C. 376.

(*x*) *Doe v. Jones*, *supra*; *Doe v. Durnford*, 2 C. & J. 667, 669; *Bennett v. Herring*, 3 C. B. N. S. 370.

(*y*) *Doe v. Gladwin*, 6 Q. B. 953; *Doe v. Peck*, 1 B. & Ad. 428; *Price v. Worwood*, 4 H. & N. 512.

(*z*) *Doe v. Woodbridge*, 9 B. & C. 376.

(*a*) *Shepherd v. Berger*, [1891] 1 Q. B. 597.

(*b*) *Coward v. Gregory*, L. R. 2 C. P. 153, 170.

against insolvency when the insolvent has been discharged (*c*), and of a condition against conviction for felony (*d*), are not of a continuing nature. A covenant against alienation is broken afresh by each alienation, but so long as an assignment or sub-lease cannot be determined by the person who made it there is no continuing breach (*e*).

Recovery of damages does not prevent forfeiture.

Nor does subsequent performance.

Licence for breach.

The recovering of damages for breach of covenant does not prevent the landlord from enforcing a forfeiture incurred by that breach (*f*). A breach of covenant is not cured by subsequent performance of that covenant so as to prevent a forfeiture (*g*), though in certain cases relief is granted as of right under such circumstances (*h*).

A parol licence to break a covenant does not justify the breach and operate as a waiver of forfeiture therefor (*i*). If a continuing breach has been continued for a long period with the knowledge of the landlord a valid licence to the tenant may be presumed (*k*).

An implied waiver of a forfeiture for breach of covenant or condition never did destroy the condition or proviso for re-entry (*l*). An express waiver, however, had that effect before the Act of 23 & 24 Vict. c. 38 (*m*), which provides that an actual waiver of the benefit of any covenant or

(*c*) *Doe v. Rees*, 4 B. N. C. 384.

(*d*) *Doe v. Pritchard*, 5 B. & Ad. 765.

(*e*) *Goodright v. Davids*, 2 Cowp. 803; *Doe v. Bliss*, 4 Taunt. 735; *Walrond v. Hawkins*, L. R. 10 C. P. 342; see *Laurie v. Lees*, 14 Ch. D. 249.

(*f*) *Coward v. Gregory*, L. R. 2 C. P. 153.

(*g*) *Wilson v. Wilson*, 14 C. B. 616; *Penniall v. Harborne*, 11

Q. B. 368; *Doe v. Shewin*, 3 Camp. 134.

(*h*) See *post*, p. 120.

(*i*) *Doe v. Gladwin*, 6 Q. B. 953; *Roe v. Harrison*, 2 T. R. 425; *West v. Blakeway*, 2 M. & Gr. 729.

(*k*) *Gibson v. Doeg*, 2 H. & N. 615; *Miles v. Tobin*, 17 L. T. 432, 435.

(*l*) *Doe v. Peck*, 1 B. & Ad. 428; *Doe v. Bliss*, 4 Taunt. 735.

(*m*) S. 6. See App. B. p. 348.



condition in a lease, in any one particular instance, shall not extend to any other instance or breach than that to which such waiver shall specially relate, or be a general waiver of the benefit of any such covenant or condition, unless an intention appears to that effect (n).

(n) S. 6. See App. B. p. 348.

## CHAPTER X.

### RELIEF AGAINST FORFEITURE.

Formerly in equity only.

THE courts of law, though leaning against forfeitures, could not formerly give any relief to a tenant when a forfeiture had been clearly proved, but always enabled the landlord to eject (*a*). Relief could only be obtained by the tenant proceeding in equity to restrain the landlord from proceeding with an ejectment. Such an injunction would in general only be granted when the ejectment was for non-payment of rent. Where the forfeiture was for other breaches of condition or covenant equity would only interfere in cases of fraud (*b*) or misleading on the part of the landlord (*c*), accident (*d*), surprise (*d*) or mistake (*d*), and this was so even in forfeitures for non-insurance (*e*).

Staying proceedings by courts of law.

Somewhat later even the courts of law assumed the power of staying proceedings in an ejectment action for non-payment of rent, at any time before execution executed, upon payment of all arrears of rent and all costs (*f*); but after execution executed the courts of law could do nothing, and the person seeking relief had to go to the Court of Chancery (*f*).

Statutory provisions,  
4 Geo. II.  
c. 28.

The first statute which dealt with the matter was

(*a*) *Doe v. Asby*, 10 A. & E. 71.

(*b*) *Burke v. Prior*, 15 Ir. Ch. Rep. 106.

(*c*) *Meek v. Carter*, 4 Jur. N. S. 992; *Hughes v. Met. Rlwy.*, 1 C. P. D. 120, 2 App. Cas. 439.

(*d*) *Bamford v. Creasy*, 3 Giff. 675; *Bargent v. Thomson*, 4 Giff. 473; *Barrow v. Isaacs*, [1891] 1 Q. B. 417.

(*e*) *Barrow v. Isaacs*, *supra*.

(*f*) *Hare v. Elms*, [1893] 1 Q. B. 604.

4 Geo. II., c. 28 (*g*), which limited the time within which relief could be granted in equity in cases of forfeiture for non-payment of rent to a period of six months after execution executed (*g*), and enacted in a statutory form the above practice of the courts of law (*g*). This statute was followed by the Common Law Procedure Acts, 1852 (*h*) and 1860 (*i*), which now regulate the powers of the courts of granting relief against forfeitures for non-payment of rent.

C. L. P.  
Acts, 1852  
and 1860.

By 22 & 23 Vict. c. 35 (*k*), courts of equity were empowered to grant relief upon certain terms and conditions in cases of forfeiture for non-insurance, and this power was extended to courts of law by the Common Law Procedure Act, 1860 (*l*). These provisions have now been repealed by the Conveyancing Act, 1881 (*m*).

Non-  
Insurance,  
22 & 23 Vict.  
c. 35.

The Conveyancing Act of 1881 (*m*), as amended and extended by the Conveyancing Act, 1892 (*n*), now confer the statutory powers of granting relief for non-insurance and for many other breaches of condition or covenant.

Conveyan-  
cing Acts,  
1881 and  
1892.

At the present time, therefore, the powers and practice of the courts, both of law and equity, in granting relief against forfeitures, are regulated as to :—

Present  
powers to  
grant relief.

1. Non-payment of rent, by the Common Law Procedure Acts, 1852 (*o*) and 1860 (*p*), except where the practice only is altered by the Judicature Acts and Rules.

2. All other breaches of conditions or covenants, by the Conveyancing Acts, 1881 (*q*), and 1892 (*n*), with the exceptions therein contained.

- |  |  |
|--|--|
| ( <i>g</i> ) Sa. 2—4. Now repealed.  | ( <i>l</i> ) 23 & 24 Vict. c. 126, s. 2.       |
| ( <i>h</i> ) 15 & 16 Vict. c. 76, ss. 210—212.   | ( <i>m</i> ) 44 & 45 Vict. c. 41.              |
| ( <i>i</i> ) 23 & 24 Vict. c. 126, s. 1. Sa. 3—11 are repealed by 46 & 47 Vict. c. 49. | ( <i>n</i> ) 55 & 56 Vict. c. 13.              |
| ( <i>k</i> ) Sa. 4, 6, 8, 9.   | ( <i>o</i> ) 15 & 16 Vict. c. 76, ss. 210—212. |
|  | ( <i>p</i> ) 23 & 24 Vict. c. 126, s. 1.       |
|  | ( <i>q</i> ) S. 14.                            |

3. The cases which are not within the Conveyancing Acts, by the equitable jurisdiction of the High Court of Justice (*r*).

### 1. *Non-payment of Rent.*

Relief for  
non-payment  
of rent.

In the case of forfeiture for non-payment of rent the proceedings are stayed upon payment, at any time before the trial, by the tenant, of all rent and arrears and costs, upon a summary application to the court or a judge (*s*). After execution executed the tenant can obtain relief within six months, upon a summary application, upon the same terms and conditions in all respects as to payment of rent, costs, and otherwise, as in the Chancery Division (*t*); these terms are usually the payment of all rent, and arrears, and full costs. After judgment and execution executed in an action of ejectment under sect. 210 of the Common Law Procedure Act, 1852, the tenant is barred from all relief at law or in equity after six months from execution executed (*u*). If the tenant does proceed in equity for relief within six months, he must within forty days after defence pay into court all arrears and costs (*x*). The rent to be paid, tendered, or paid into court, must be calculated up to the last rent day (*y*). In a case where the landlord had obtained judgment, but without costs, relief was granted to the tenant upon the terms of paying no other costs than those of the application for relief (*z*), the rent having been paid.

Sub-lessees (*a*), and mortgagees (*b*) can obtain relief under these Acts as "assignees." Where a sub-lessee applied

(*r*) *Barrow v. Isaacs*, [1891] 1 Q. B. 417.

(*s*) C. L. P. Act, 1852, s. 212. See Archbold's Pract. p. 1245 (ed. 14).

(*t*) C. L. P. Act, 1860, s. 1.

(*u*) C. L. P. Act, 1852, s. 210.

(*x*) *Id.* s. 211.

(*y*) *Doe v. Roe*, 4 Taunt. 887.

(*z*) *Croft v. London, etc., Bank*, 14 Q. B. D. 347.

(*a*) *Doe v. Byron*, 1 C. B. 623

(*b*) *Doe v. Roe*, 3 Taunt. 402.

for relief, it was held that the "original lessee" must be made a party to the application (c). In this case there had been no assignment of the term (c); if there had been, it would appear that, upon the same principle, the assignee of the term ought to be made a party to the application.

If the lessor has re-entered without bringing an action, all rent and arrears must be tendered within six months from the re-entry to entitle the tenant to relief (d). Actual re-entry, without opposition by the tenant, is equivalent to recovery of possession by action (d).

Instead of applying under the Act of 1860, the tenant may apply for relief in the Chancery Division itself (e). In equity the terms generally imposed are payment of all rent and arrears and full costs (d).

## 2. *Relief under the Conveyancing Acts.*

The powers of the courts both of law and equity to relieve tenants from forfeitures for breaches of conditions or covenants have been largely extended by the Conveyancing Acts, 1881 (f) and 1892 (g). Under the provisions of these Acts relief can now be given in all cases, with some exceptions (h).

Relief under the Conveyancing Acts for other breaches of covenants.

These exceptions are as follows :—

Exceptions.

(a) Conditions and covenants against assigning, under-letting, parting with the possession of, or disposing of, the demised premises (i).

Conditions against alienation.

(b) Covenants in a mining lease to allow the lessor to have access to, or inspect, books, accounts, records, weighing machines or other things, or to enter or

Covenants in mining leases.

(c) *Hare v. Elms*, [1893] 1 Q. B. 604.

(h) S. 14, sub-s. 6 of the Act of 1881, and s. 2, sub-s. 2 of the Act of 1892.

(e) *Re Brain*, 10 Eq. 389.

(f) 44 & 45 Vict. c. 41, s. 14.

(i) S. 14, sub-s. 6.

(g) 55 & 56 Vict. c. 13.

inspect the mine or workings (*j*). A mining lease is defined in the Act of 1881 (*k*).

Non-payment  
of rent.

(c) Forfeiture for non-payment of rent (*l*).

Bankruptcy  
or taking in  
execution.

(d) Conditions for forfeiture on the bankruptcy of the lessee, or the taking in execution of the lessee's interest (*m*). By the provisions of the Conveyancing Act, 1892, this exception does not take effect until the expiration of one year from the date of the bankruptcy or execution, and does not take effect at all if the lessee's interest be sold within that year (*n*). This modification introduced by the Act of 1892 does not, however, apply to leases of (i.) agricultural or pastoral land ; (ii.) a public house or beershop ; (iii.) a furnished house ; (iv.) any property with respect to which the personal qualifications of the tenant are of importance (*n*). "Bankruptcy" is defined by the Act of 1881 (*o*).

Notice before  
enforcing  
forfeiture.

By the Act of 1881 a right of re-entry is not enforceable at all until the lessor has served the lessee with a notice and the lessee has failed to comply with such notice (*p*) ; and when the right of re-entry becomes enforceable upon non-compliance with the notice and the lessor enforces it, or proceeds to enforce it, the lessee can obtain relief (*q*).

What notice.

The object of this notice is to give the lessee an opportunity of making good the breach complained of and so

(*j*) S. 14, sub-s. 6.

(*k*) S. 2 (11) of the Act of 1881.  
See App. B. p. 357.

(*l*) S. 14, sub-s. 8. See *ante*,  
p. .

(*m*) S. 14, sub-s. 6 of the Act  
of 1881.

(*n*) S. 2, sub-s. 2 of the Act of

1892. See App. B. p. 375.

(*o*) S. 2 (15) of the Act of  
1881. See App. B. p. 358. *Ex  
parte Gould, Re Walker*, 13 Q. B.  
D. 454.

(*p*) S. 14, sub-s. 1. See *Swain  
v. Ayres*, 21 Q. B. D. 289.

(*q*) S. 14, sub-s. 2.

depriving the lessor of his right to re-enter (*r*). The notice must specify every breach complained of and must require the lessee to remedy the same if it is capable of remedy (*rr*). If there is anything for which to compensate and the lessor requires compensation for the breach, the notice must claim such compensation (*rr*); a notice is good without any claim for compensation (*s*).

If the lessee, after notice, fails to remedy the breach within a reasonable time, and to make reasonable compensation to the satisfaction of the lessor when compensation is claimed in the notice, the lessor may proceed to enforce his right of re-entry (*t*). If the lessor proceeds by action without having given a proper notice, that fact may be pleaded as a defence (*u*); or if in such a case judgment has been obtained by default against the lessee, an assignee or mortgagee may apply to have the judgment set aside (*x*), the lessee being made a party to the application (*x*). If the lessor, not having given a proper notice, re-enters without action, the lessee can recover back possession of the premises by action.

Where no  
notice given.

"Reasonable compensation" means such compensation as might have been recovered in an action by the lessor for breach of covenant, and does not include the expenses of a survey of the premises and of preparing the notice (*y*). The lessor may, however, recover as a debt all reasonable costs and expenses properly incurred in the employment of a solicitor and surveyor or valuer, or otherwise, in refer-

What is  
reasonable  
compensation.

(*r*) *Cresswell v. Davidson*, 56 L. T. 811; *Coatsworth v. Johnson* 55 L. J. Q. B. 220.

(*rr*) S. 14, sub-s. 1. See *Swain v. Ayres*, 21 Q. B. D. 289.

(*s*) *Lock v. Pearce*, [1893] 2 Ch. 271.

(*t*) S. 14, sub-s. 1, *Skinnors Co.*

*v. Knight*, [1891] 2 Q. B. 542.

(*u*) *North London ... Co. v. Jacques*, 32 W. R. 283; *Jacques v. Harrison*, 12 Q. B. D. 136, 165; *Scott v. Brown*, 51 L. T. 746.

(*x*) *Jacques v. Harrison*, *supra*.

(*y*) *Skinnors Co. v. Knight*, [1891] 2 Q. B. 542

ence to a forfeiture which has been waived in writing, or from which the lessee "is relieved" under the Act of 1881 or 1892 (z). Where the "lessee," by complying with the terms of the notice, had prevented the "lessor" from enforcing his right of re-entry, the Queen's Bench Division held that he had been "relieved" within the meaning of the above section (a); but Lord Esher and Davey, L.J., in the Court of Appeal, expressed the opinion that that decision was wrong (a).

Form of  
notice.

This notice may be addressed to the "lessee" by that designation, without his name; or generally to the persons interested without any name, though any person to be affected by the notice is abroad, under disability, unborn, or unascertained (b).

Service.

The notice may be served by being left at the last-known place of abode or business in the United Kingdom of the person to be served; or it may be affixed to, or left for the lessee upon, the land or any house comprised in the lease; or, in the case of a mining lease, it may be left at the office or counting-house of the mine (c). It may also be served by post in a registered letter addressed to the lessee or other person to be served by name at any of the above places, as the case may be; and, if not returned undelivered, it is deemed to have been served at the time at which the letter would be delivered in the ordinary course of post (d).

Application  
for relief,  
when made.

When the lessor is proceeding, by action or otherwise, to re-enter, the lessee may apply to the court for relief, either in the action brought by the lessor, or in an action

(z) Conveyancing Act, 1892, s. 2, sub-s. 1.

(a) *Nind v. Nineteenth Century Soc.*, [1894] 1 Q. B. 472; [1894] 2 Q. B. 226.

(b) S. 67, sub-s. 2 of the Act of 1881.

(c) *Id.* sub-s. 3

(d) *Id.* sub-s. 4.



brought by himself for that purpose (e). The court may grant or refuse relief in its discretion, having regard to the proceedings and conduct of the parties under sect. 14, and to all the other circumstances of the case (f). Relief may be granted upon such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the grant of an injunction to restrain any like breach in future, as the court may think fit (f). Terms imposed.

When the lessor is proceeding to enforce a forfeiture an under-lessee of all or part of the property may apply in like manner, and the court may make an order vesting the whole or part of the property, as the case may be, in the underlessee, for the whole or part of the term, upon such terms as to the execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, security, or otherwise as the court thinks fit (g). The under-lessee is not entitled to demand a lease for any longer term than he had under his sub-lease (g). Application by under-lessee for vesting order.

An application for relief, or by an under-lessee for a vesting order, cannot be made under these Acts after the lessor has actually re-entered (h).

For the purposes of sect. 14 of the Act of 1881 a "lease" includes an original or derivative under-lease (i); also an agreement for a lease when the lessee has become entitled to have his lease granted (k). An "under-lease" includes an agreement for an under-lease when the under-lessee has become entitled to have his under-lease Definition of "Lease,"

(e) Conveyancing Act, 1881, s. 14, sub-s. 2; 44 & 45 Vict. c. 41.

(f) S. 14, sub-s. 2; *Scott v. Brown*, 51 L. T. 746; *Fleetwood v. Hull*, 23 Q. B. D. 35.

(g) Conveyancing Act, 1892, s. 4.

(h) *Quilter v. Mapleson*, 9 Q.

B. D. 672; *Rogers v. Rice*, [1892] 2 Ch. 170.

(i) S. 14, sub-s. 3.

(k) S. 5 of the Act of 1892. See *Coatsworth v. Johnson*, 55 L. J. Q. B. 220; *Swain v. Ayres*, 21 Q. B. D. 289.

granted (*kk*). A "lease" also includes a grant at a fee farm rent, or securing a rent by condition (*l*).

"Lessor," A "lessor" includes an original or derivative under-  
lessor, and the heirs, executors, administrators, and assigns  
of a lessor (*l*); also a grantor as above described and his  
heirs and assigns (*l*).

"Lessee," A "lessee" includes an original or derivative under-  
lessee, and the heirs, executors, administrators and  
assigns (*ll*) of a lessee (*l*); also a grantee under the above-  
described grant, his heirs and assigns (*l*). For the purpose of  
obtaining a vesting order an "under-lessee" includes any  
person deriving title under or from an under-lessee (*m*).

"Under-  
lessee."

Who can  
obtain relief.

The under-lessee of a lessee cannot, under sect. 14,  
obtain relief against the original lessor (*n*). An under-  
lessee can only obtain relief when his lessor is proceeding  
against him (*n*); he can, however, in any case obtain a  
vesting order under the Act of 1892 (*o*).

An equitable mortgagee of a lessee can obtain relief  
against the lessor, but the lessee must be made a party to  
the application (*p*).

Sect. 14 applies, although the proviso or stipulation  
under which the right of re-entry or forfeiture accrues is  
inserted in the lease in pursuance of the directions of any  
Act of Parliament (*q*). This was formerly a doubtful ques-  
tion (*r*). Relief can be obtained against the crown apart  
from this provision (*s*).

(*kk*) S. 5 of the Act of 1892. See  
*Coatsworth v. Johnson*, 55 L.J.Q.B.  
220; *Swain v. Ayres*, 21 Q.B.D. 289.

(*l*) S. 14, sub-s. 3.

(*ll*) *Cronin v. Rogers*, 1 C. & E. 348.

(*m*) S. 5 of the Act of 1892.

(*n*) *Burt v. Gray*, [1891] 2 Q.B.  
98; *Cresswell v. Davidson*, 56 L.  
T. 811; *Nind v. Nineteenth*  
*Century Soc.*, [1894] 2 Q.B. 226.

(*o*) S. 4.

(*p*) *North London ... Co. v.*  
*Jacques*, 49 L. T. 659.

(*q*) S. 14, sub-s. 4.

(*r*) *Re Brain*, 10 Eq. 369;  
*Keating v. Sparrow*, 1 B. & B. Ir.  
Ch. Rep. 367; *A.-G. of Victoria*  
*v. Ettershank*, L. R. 6 P. C. 354.

(*s*) *A.-G. of Victoria v. Etter-*  
*shank*, *supra*.

A lease limited to continue so long only as the lessee abstains from committing a breach of covenant is to be construed as a lease for any longer term for which it could subsist, but determinable by a proviso for re-entry on any such breach (*t*); and sect. 14 applies to all leases whether made before or after the Act (*u*), and takes effect notwithstanding any stipulation to the contrary (*u*); it applies to all breaches whether committed before or after the Act (*a*).

Where a lessee has a right of renewal upon the performance of certain conditions, but forfeits such right by non-performance of the conditions, he cannot obtain relief under these Acts; such a case does not come within sect. 14 (*y*).

Forfeiture  
right of  
renewal.

This Act imposes on judges the difficult duty of deciding the terms upon which relief ought to be granted. Where there has been a breach of condition or covenant, but no actual pecuniary loss to the landlord, it is very difficult to say what compensation ought to be made. Probably no damages will be given, but the only penalty inflicted will be the payment of costs. If the lessor has not asked for compensation in his notice, he cannot ask to have the payment of compensation made a condition of relief (*z*).

Instances of  
terms  
imposed.

Some instances of the terms imposed may be useful,—

- (a) Where the breach was non-insurance :—Payment of all premiums paid by the landlord with the interest thereon, of rent up to date of relief, and of all costs (*a*).
- (b) Where the breach was non-completion of buildings :—Payment of all rent in arrear and all costs,

(*t*) S. 14, sub-s. 5.

(*u*) *Id.* sub-s. 9.

(*y*) *Rutledge v. Whelan*, 10 L. R. Ir. 263.

(*z*) *Lock v. Pearce*, [1893] 2

Ch. 271, per Lord Esher, M.R.

(*a*) *Quilter v. Mapleson*, 9 Q. B. D. 672.

and an undertaking to complete within a limited time, and if not to redeem possession (b).

- (c) Where the breach was non-repair :—Security to the satisfaction of the master to put the premises in repair ; in four months to put the premises in repair to the satisfaction of a third person ; payment of all arrears of rent and costs (c).

In a case of a breach of covenant to repair, the court granted relief upon the defendant paying the costs, as between solicitor and client, of the action and of the proceedings for relief and surveyors' fees in respect of the service of the notice and preparation of the specification incurred before action brought. The payment of these costs and expenses may be made a condition of granting relief, though they cannot be demanded as compensation in the notice to be given before proceedings to enforce a forfeiture (d).

Application  
for relief,  
how made.

When application is made for relief in the lessor's action, or for a vesting order, it may be made by way of counter-claim (e), or by an application by summons at chambers (f). In one case it was granted upon application at the trial, though not asked for by the pleadings (g). When not made in the lessor's action the application for relief must be made in the Chancery Division (h), and by an action commenced in the ordinary way, not by originating summons (i). The lessee can only apply in the lessor's

(b) *North London Freehold Landed Co. v. Jacques*, 49 L. T. 659.

(c) *Mitchison v. Thomson*, 1 C. & E. 72. Other cases, *Bond v. Freke*, W. N. (1884) 47.

(d) *Bridge v. Quicke*, 67 L. T. 54, distinguishing *Skinner v. Knight*, *supra*.

(e) *Cholmeley's School v. Sewell*, [1893] 2 Q. B. 254.

(f) S. 69, sub-a. 3.

(g) *Mitchison v. Thomson*, 1 C. & E. 72.

(h) S. 69, sub-a. 1 ; *Lock v. Pearce*, [1893] 2 Ch. 271.

(i) *Lock v. Pearce*, *supra*.

action when that action is brought in the High Court (*i*) ; if the lessor is proceeding in a county court, the lessee must himself bring an action in the Chancery Division for relief (*i*).

### 3. *Equitable Relief in other Cases.*

In the cases excepted from the provisions of sect. 14 of the Conveyancing Act the equitable jurisdiction of the High Court of Justice still remains.

In such cases equity will relieve where the breach has been occasioned by fraud (*k*), misleading (*l*) on the part of the lessor, accident, surprise (*m*), or mistake (*n*), but even then, only when there can be complete compensation, or where there is no injury which requires any compensation (*o*). Equity will not relieve where the mistake arises from the negligence (*p*) or the mere forgetfulness (*q*) of the suitor who seeks its help ; nor will it relieve where the breach has been wilful (*r*) ; nor against gross improvidence (*s*) ; nor on the sole ground that full compensation can be made (*t*).

Jurisdiction  
of equity in  
excepted  
cases.

(*k*) *Burke v. Prior*, 15 Ir. Ch. Rep. 106.

(*l*) *Meek v. Carter*, 4 Jur. N. S. 992 ; *Hughes v. Metropolitan Rwy. Co.* 1 C. P. D. 120, 2 App. Cas. 439.

(*m*) *Bargent v. Thomson*, 4 Giff. 473 ; *Barnford v. Creasy*, 3 Giff. 675.

(*n*) *Barrow v. Isaacs*, [1891] 1 Q. B. 417.

(*o*) *Green v. Bridges*, 4 Sim. 96 ; *Barrow v. Isaacs*, [1891] 1 Q. B. 417.

(*p*) *Barrow v. Isaacs*, at p. 428,

[1891] 1 Q. B. See, however, *Esher, M. R.*, S. C. p. 421.

(*q*) *Barrow v. Isaacs*, at p. 421.

(*r*) *Sanders v. Pope*, 12 Ves. 282 ; *Hill v. Barclay*, 16 Ves. 402 ; 18 Ves. 56 ; *Reynolds v. Pitt*, 19 Ves. 134.

(*s*) *Beaufort v. Neeld*, 12 Cl. & F. 248.

(*t*) *Hill v. Barclay*, *supra* ; *Gregory v. Wilson*, 9 Hare, 683 ; *Nokes v. Gibbon*, 26 L. J. Ch. 433 ; *Job v. Banister*, 2 K. & J. 374 ; *Barrow v. Isaacs*, [1891] 1 Q. B. 417.

## CHAPTER XI

### BY TENANT.

Tenant may  
recover pos-  
session  
immediately  
after demise ;

without  
having  
entered.

*Interesse  
termini.*

Agreement  
for lease.

Where lessor  
no estate  
in possession.

A TENANT for lives, for years, or from year to year, is during the existence and continuance of the term generally entitled to actual possession of the demised premises (a), and he or any person claiming through or under him (b) may eject the lessor or any person claiming through or under the lessor by title subsequent to the demise (c). A tenant can recover possession of the demised premises immediately upon the making of the demise whether he has actually entered under it or not (d). The *interesse termini*, which a lessee under a present demise has before entry, is a sufficient title upon which to maintain ejectment (d); but where there was only an agreement to demise, the proposed tenant could not maintain ejectment until he had actually entered (e). He cannot, however, sue for trespass to the land unless he has actually entered (f).

If the lessor had no estate in possession at the time of the demise, the lease operates by estoppel as soon as the lessor does acquire such an estate, and the tenant may

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| <p>(a) <i>Doe v. Lewis</i>, 1 Burr. 614.<br/>                 (b) <i>Doe v. Glenn</i>, 1 A. &amp; E. 49.<br/>                 (c) <i>Doe v. Thomas</i>, 9 B. &amp; C. 288.<br/>                 (d) <i>Doe v. Day</i>, 2 Q. B. 147, 156; <i>Doe v. Ries</i>, 8 Bing. 178; <i>Ryan v. Clarke</i>, 14 Q. B. 65, 73; <i>Williams v. Bosanquet</i>, 1 B. &amp; B. 238; <i>Doe v. Walker</i>, 5 B. &amp; C. 111, Shep. Touch. 269, Co. Lit.</p> | <p>46 b.<br/>                 (e) <i>Doe v. Ries</i>, 8 Bing. 178; <i>Price v. Birch</i>, 4 M. &amp; Gr. 1; <i>Doe v. Powell</i>, 7 M. &amp; Gr. 980. See <i>post</i>, p. 129.<br/>                 (f) <i>Ryan v. Clark</i>, 14 Q. B. 65; <i>Turner v. Cameron</i>, 5 Exch. 932; <i>Wheeler v. Montefiore</i>, 2 Q. B. 133, 156; <i>Litchfield v. Ready</i>, 5 Exch. 939.</p> |
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then recover possession (g). When the term is to commence *in futuro*, the tenant cannot recover possession until the date (h) when the term is to commence (h). Term to commence on a future day.

If a lease is absolutely void, as, for instance, by statute, the tenant cannot bring ejectment upon it against the lessor or a stranger (i); but if it is only voidable, as for fraud, a tenant can bring ejectment upon it until it has been cancelled by a Court of Equity (k). A lease of copyholds, which is void as against the lord of the manor for being contrary to the custom, is valid against everyone but the lord, and the tenant may bring ejectment upon it against the lessor (l). Tenant under void or voidable lease.  
  
Copyholds.

After the term had been taken in execution by the sheriff, the tenant could recover possession from a purchaser from the sheriff, if a proper assignment had not been executed (m). Since the Judicature Acts the purchaser's equitable title would be a good defence (m). Term taken in execution, but not assigned.

If a tenant seeks to recover possession from a stranger, he must prove that the term is vested in him, and the title of his landlord; but in an action against his landlord, he need only prove the creation of the term and that it is vested in himself. A mere agreement for a lease, where no term has arisen by operation of law, as by entry or payment of rent, was not a sufficient title at law upon which to recover possession of the land agreed to be leased, but perhaps the Judicature Acts have the effect of making it so (n). What tenant must prove.  
  
Where mere agreement for lease.

(g) *Doe v. Oliver*, 5 M. & Ry. 416; *Downingham's case*, Owen, 17; *Doe v. Bousfield*, 6 Q. B. 202.

(h) *Smith v. Day*, 2 M. & W. 492.  
684.

(i) *Doe v. Barber*, 2 T. R. 749; 372.  
*Doe v. Scott*, 11 East, 478.

(k) *Feret v. Hill*, 15 C. B. 207. (n) *Walsh v. Lonsdale*, 21 Ch D. 9. See pp. 2, 50.

(l) *Doe v. Tressidder*, 1 Q. B.

## CHAPTER XII.

### MORTGAGOR AND MORTGAGEE.

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|---|---|
| 1. <i>By Mortgagee against Mortgagor and Tenants</i> , 130. | 2. <i>By Mortgagor</i> , 137.<br>3. <i>Staying Proceedings</i> , 138. |
|---|---|

#### 1. *By Mortgagee against Mortgagor and Tenants.*

Position of  
mortgagor  
after mort-  
gage.

IMMEDIATELY upon the execution of the mortgage deed the estate of the mortgagor passes to the mortgagee, and, unless there is in the mortgage deed, or in a separate deed, a proviso or stipulation amounting in law to a re-demise by the mortgagee to the mortgagor, the mortgagor who remains in possession is at the most a tenant at sufferance, and may be ejected at any time by the mortgagee without notice or demand of possession (a).

If there be no such proviso or stipulation, but the mortgagee either expressly or impliedly consent to the mortgagor remaining in possession, the latter becomes tenant at will to the former (b).

Re-demise to  
mortgagor  
with default.

There is usually in the mortgage deed some proviso or stipulation providing for the possession of the mortgagor until default. Such proviso or stipulation will not operate

(a) *Knox v. Holt*, 1 Sm. L. C. 64; *Sheldrake v. Widdow*, 1 Sm. L. C. 245; *Forster v. Goss*, 5 F. & F. 421; *Forster v. Moxon*, 7 L. J. K. R. 54 (a.s.).  
 (b) *Forster v. Moxon*, 9 A. & E. 322; *Knox v. Holt*, 1 Sm. L. C. 65; *Sheldrake v. Widdow*, 1 Sm. L. C. 246.



as a re-demise to the mortgagee unless it be affirmative on the part of the mortgagee that the mortgagor shall have possession until default, and the time of default be certain and determined (c). Thus, merely negative stipulations that the mortgagee shall not sell or lease (d), intermeddle with the possession or perception of rents (e), or take any means to obtain possession until default (f), will not operate as a re-demise by the mortgagor to the mortgagee; so also a stipulation that the mortgagee shall enter *after* default (g). Nor will any stipulations in which the time is uncertain, as that the mortgagee shall hold until default, for which no time is fixed (h); or which depend upon notice to be given by the mortgagee (i); but a proviso that the mortgagor shall hold until a certain day, unless he make default upon notice at an earlier day, is good as a demise until the day certain, though defeasible at the earlier day (k).

When there is such a re-demise to the mortgagor, he has an interest in the nature of a term of years until default, and then he becomes a tenant at sufferance (l).

There is also frequently an express agreement that the mortgagor shall attorn and become tenant to the mortgagee as tenant at will (m), or from year to year (n), or

Attornment  
by mortgagor  
to mortgagee.

(c) *Doe v. Day*, 2 Q. B. 147;  
*Doe v. Lightfoot*, 8 M. & W. 553;  
*Powseley v. Blackman*, Cro. Jac.  
659; *Evans v. Thomas*, Cro. Jac.  
172; *Jemmot v. Cooly*, 1 Lev.  
170; *Bishop of Bath's case*, 6 Co.  
Rep. 34 b.; *Doe v. Goldwin*, 2  
Q. B. 143; *Wilkinson v. Hall*, 3  
B. N. C. 508; *Shep. Touch.* 272.  
(d) *Doe v. Day*, 2 Q. B. 147.  
(e) *Powseley v. Blackman*, Cro.  
Jac. 659.  
(f) *Doe v. Davies*, 7 Exch. 89.

(g) *Rogers v. Grazebrook*, 8 Q.  
B. 895.  
(h) *Doe v. Day*, 2 Q. B. 147.  
(i) *Id.*  
(k) *Fenn v. Bittleston*, 7 Exch.  
152; *Brierley v. Kendall*, 17 Q.  
B. 937.  
(l) *Gibbs v. Cruikshank*, L. R.  
8 C. P. 454; *Keech v. Hall*, 1 Sm.  
L. C. 537 (9th ed.).  
(m) *Doe v. Coz*, 11 Q. B. 122.  
(n) *Daubuz v. Lavington*, 13  
Q. B. D. 347; *Mumford v.*

for a term of years (*o*), or for any other period (*p*). Such a tenancy is a valid tenancy, though the agreement by which it is created may be void as a bill of sale under the Bills of Sale Acts, 1878 (*q*) and 1882 (*r*), so far as it gives a right to distrain (*s*).

Whether a tenancy has been created between the mortgagor and mortgagee, and what are the terms of such tenancy, is a question to be determined by the language and intention of each agreement (*t*). The mere reservation of a yearly rent will not create a yearly tenancy if the agreement is expressly for a tenancy at will (*u*). An immediate power of re-entry may be annexed to a tenancy of any kind, and will override all the terms usually incident to the tenancy which is expressed to be created, and may be exercised at any moment so as to determine the tenancy otherwise than in the usual way (*x*). A power to distrain for interest as for rent does not of itself create any tenancy (*y*).

If any proviso, stipulation, or express agreement purports to create a tenancy for more than three years it will

*Collier*, 25 Q. B. D. 279; *Metropolitan Soc. v. Brown*, 28 L. J. Ex. 340; *Kearsley v. Phillips*, 11 Q. B. D. 621; *Re Threlfall*, 16 Ch. D. 274.

(*o*) *Morton v. Woods*, L. R. 4 C. B. 293.

(*p*) *Ex parte Voisey*, 21 Ch. D. 442.

(*q*) S. 6, 41 & 42 Vict. c. 31.

(*r*) S. 9, 45 & 46 Vict. c. 43.

(*s*) *Hall v. Comfort*, 18 Q. B. D. 11; *Mumford v. Collier*, 25 Q. B. D. 279; *Re Willis*, 21 Q. B. D. 384; *Green v. Marsh*, [1892] 2 Q. B. 330.

(*t*) *Jolly v. Arbuthnot*, 4 De G. & J. 224; *Chapman v. Beecham*,

3 Q. B. 723; *Pinhorn v. Souster*, 8 Exch. 763; *Anderson v. Midland Rlwy. Co.*, 3 E. & E. 614; *Walker v. Giles*, 6 C. B. 662; *Clowes v. Hughes*, L. R. 5 Ex. 160.

(*u*) *Doe v. Cox*, 11 Q. B. 122; *Doe v. Davies*, 7 Exch. 89; *Pinhorn v. Souster*, 8 Exch. 763.

(*x*) *Re Threlfall*, 16 Ch. D. 274; *Morton v. Woods*, L. R. 4 Q. B. 293; *Doe v. Olley*, 12 A. & E. 481; *Doe v. Tom*, 4 Q. B. 615; *Metropolitan Soc. v. Brown*, 28 L. J. Ex. 340.

(*y*) *Doe v. Goodier*, 10 Q. B. 957.

create only a tenancy at will unless the instrument be executed by the mortgagee (z), or unless the mortgagor has paid rent under it (z).

The mortgagee may by his acts or conduct so recognise the possession of the mortgagor as being lawful that he cannot afterwards treat him as being a trespasser during the time he has so recognised his possession (a), or may make him a tenant at will (a). By acceptance of rent from a mortgagor the mortgagee may convert him into a yearly tenant (b).

Recognition  
of possession  
of mortgagor.

With reference to tenancies existing at the time of the execution of the mortgage deed, the mortgagee is in the position of an assignee of the reversion, and the tenants become his tenants, and he has the same right to eject such tenants as an ordinary assignee of the reversion (c) would have, and no greater right (d). No alteration in the rent or terms of tenancy made by the mortgagor after the mortgage will have the effect of destroying such tenancies, or will alter the relationship between the mortgagee and such tenants, but the mortgagee may adopt the acts of the mortgagor as those of his agent (e).

Tenancies  
existing at  
time of mort-  
gage.

Such tenants can always, at common law, resist ejection by the mortgagor, upon the ground that his title has expired upon the execution of the mortgage (f). Now,

(z) *Doe v. Lightfoot*, 8 M. & W. 553, 564; *Morton v. Woods*, L. R. 4 Q. B. 293; *West v. Fritche*, 3 Exch. 216; *Burton v. Dickenson*, 17 L. T. 264.

(a) *Evans v. Elliott*, 9 A. & E. 342; *Doe v. Hales*, 7 Bing. 322; *Doe v. Cadwallader*, 2 B. & Ad. 473; *Doe v. Goodier*, 10 Q. B. 957; *Doe v. Hughes*, 11 Jur. 698.

(b) *Doe v. Giles*, 5 Bing. 421.

(c) See pp. 26, 40, 61.

(d) *Moss v. Gallimore*, 1 Sm. L. C. 604 (9th ed.); *Burrowes v. Gradin*, 1 D. & L. 213; *Doe v. Edwards*, 5 B. & Ad. 1065; *Rogers v. Humphreys*, 4 A. & E. 299; *Trent v. Hunt*, 9 Exch. 14; *Rawson v. Eicke*, 7 A. & E. 451; *Birch v. Wright*, 1 T. R. 378.

(e) *Burrowes v. Gradin*, 1 D. & L. 213.

(f) *Doe v. Edwards*, 5 B. & Ad. 1065; *ante*, p. 31.

however, by the Judicature Act, 1873, the mortgagor may recover possession from such tenants unless the mortgagee has given notice of his intention to take possession (*ff*).

Tenancies  
created after  
the mortgage.

At Common Law, tenants who have entered under the mortgagor after the mortgage without the privity of the mortgagee, do not become tenants of the mortgagee, and may be evicted by him without notice or demand of possession (*g*).

New tenancy  
to mortgagee  
may be  
created.

A new tenancy may be, and very often is, created between the mortgagee and such tenants. Whether such a new tenancy has been created is a question of fact to be determined in each particular case (*h*), and the terms of such tenancy must be proved by evidence (*i*). In order to create such a tenancy there must be an agreement between the tenant and the mortgagee that the former will become tenant to the latter (*j*). The previous tenancy to the mortgagor is not continued, but a new tenancy is created (*k*). The new tenancy is not upon the terms of the previous tenancy to the mortgagor, unless the parties have so agreed (*i*); and the mere demand and payment of rent is not evidence that the parties have so agreed (*i*).

(*ff*) *Post*, p. 137.

(*g*) *Keech v. Hall*, 1 Sm. L. C. 546 (9th ed.); *Thunder v. Belcher*, 3 East, 449; *Gibbs v. Cruikshank*, L. R. 8 C. P. 454; *Rogers v. Humphreys*, 4 A. & E. 299; *Lowe v. Telford*, 1 App. Cas. 414; *Corbett v. Plowden*, 25 Ch. D. 678, 681.

(*h*) *Smith v. Eggington*, L. R. 9 C. P. 145; *Corbett v. Plowden*, 25 Ch. D. 678.

(*i*) *Moss v. Gallimore*, 1 Sm. L. C. 604 (9th ed.); see *Oakley v. Monck*, L. R. 1 Ex. 159.

(*j*) *Evans v. Elliott*, 9 A. & E. 342; *Brown v. Storey*, 1 M. & Gr. 117, 126; *Hickman v. Machin*, 4 H. & N. 716; *Partington v. Woodcock*, 6 A. & E. 690; *Townson v. Jackson* [1891], 2 Q. B. 484.

(*k*) *Waddilove v. Barnett*, 2 B. N. C. 538; *Doe v. Bucknell*, 8 C. & P. 566; *Doe v. Ongley*, 10 C. B. 25; *Brown v. Storey*, *supra*; *Partington v. Woodcock*, *supra*; *Doe v. Thompson*, 9 Q. B. 1037; *Corbett v. Plowden*, 25 Ch. D. 678.

Such a new tenancy is created if the mortgagee give the tenant notice to pay rent to him, and the tenant does pay rent to him (*l*), unless such payment of rent is made to the mortgagee only as agent of the mortgagor (*m*). Mere continuance in possession after receipt of such notice from the mortgagee is no evidence that a new tenancy has been created (*n*); neither is a mere notice to quit by the mortgagee (*o*); or acceptance of rent as interest (*p*); or a distraint upon the premises for interest under a power conferred by the mortgage deed (*q*).

The mortgagee may, by his conduct towards, or treatment of, a tenant who has entered under the mortgagor after the mortgage, preclude himself from treating him as a trespasser (*r*).

Now by the Conveyancing Act, 1881 (*s*), in the case of all mortgages made since 31st December, 1881, a mortgagor in possession can make such leases as are authorised by the Act (*t*), subject to the conditions prescribed (*t*), which will be binding upon all incumbrancers. The powers of leasing conferred by this Act may, however, be excluded, modified, or enlarged by the provisions of the mortgage (*t*), and it seems to be a frequent practice to exclude these powers. The mortgagee, after giving notice

Conveyancing Act, 1883.  
Mortgagor's power to lease.

(*l*) *Partington v. Woodcock*, 6 A. & E. 690; *Rogers v. Humphreys*, 4 A. & E. 299; *Hickman v. Machin*, 4 H. & N. 716; *Doe v. Thompson*, 9 Q. B. 1037; *Evans v. Elliott*, 9 A. & E. 342; *Corbett v. Plowden*, 25 Ch. D. 678.

(*m*) *Wheeler v. Branscombe*, 5 Q. B. 373.

(*n*) *Towerson v. Jackson* [1891], 2 Q. B. 484, overruling *Brown v. Storey*, 1 M. & G. 117, and *Underhay v. Read*, 20 Q. B. D. 209, on this point.

(*o*) *Partington v. Woodcock*, *supra*; *Hickman v. Machin*, *supra*.

(*p*) *Doe v. Giles*, 5 Bing. 421.

(*q*) *Gibbs v. Cruikshank*, L. R. 8 C. P. 454.

(*r*) *Ante*, p. 133; *Doe v. Hales*, 7 Bing. 322; *Evans v. Elliott*, 9 A. & E. 342; *Doe v. Goodier*, 10 Q. B. 957; *Doe v. Cadwallader*, 2 B. & Ad. 473; *Doe v. Hughes*, 11 Jur. 698.

(*s*) 44 & 45 Vict. c. 41.

(*t*) S. 18. See App. B, p. 361.

to the lessee of his mortgage, and of his intention to exercise his rights, may enforce all the conditions and covenants of the lease relating to the subject-matter of the demise (*u*), but he is not bound by any collateral agreement between the mortgagor and the tenant (*u*). The mortgagee is bound by all conditions and covenants in the lease relating to the subject-matter of the demise (*x*).

The mortgagee while in possession has the same power of making leases which will be binding on the mortgagor (*y*).

Notice to quit must be given by mortgagee in cases within 53 & 54 Vict. c. 57.

In the case of holdings which come under the Agricultural Holdings Act, 1883 (*z*), or the Allotments and Cottage Gardens Compensation for Crops Act, 1887 (*a*), and where the contract is for a yearly tenancy, or for a term of years not exceeding twenty-one, at a rack rent, a person holding under a contract of tenancy with the mortgagor, which is not binding upon the mortgagee, can be ejected by the mortgagee only in accordance with the terms of the tenancy, or after six months' notice in writing (*b*).

The mortgagor can recover possession from any tenants whom he has let in after the mortgage, for they are estopped from denying his title (*c*), unless they have been evicted by the mortgagee either actually or constructively (*d*), in which case they may show that the mortgagor's title as landlord has expired (*e*).

Estoppel of mortgagor.

A mortgagor who has, in the mortgage deed, by recital or otherwise, made any precise averment of any title in

(*u*) *Municipal Soc. v. Smith*, 22 Q. B. D. 70.

(*x*) S. 11. See *Wilson v. Queen's Club* [1891], 3 Ch. 522.

(*y*) Conveyancing Act, 1881, s. 18, App. B, p. 361.

(*z*) 46 & 47 Vict. c. 61, s. 54.

(*a*) 50 & 51 Vict. c. 26, s. 4.

(*b*) The Tenants Compensation

Act, 1890 (53 & 54 Vict. c. 57), s. 1, s. 2, sub-s. 2.

(*c*) *Alchorne v. Gomme*, 2 Bing. 54; *Pope v. Biggs*, 9 B. & C. 245; *Moss v. Gallimore*, 1 Sm. L. C. 604 (9th ed.).

(*d*) See p. 233.

(*e*) *Higginbotham v. Barton*, 11 A. & E. 307, 314; *ante*, p. 31.

himself, is estopped from setting up against his mortgagee any prior title which is inconsistent with the title which he has so averred (*f*), and, if the mortgagor is estopped, so also are all persons claiming through or under him by title subsequent to the mortgage (*g*), except *bonâ fide* purchasers for value who have got the legal estate (*h*).

This rule applies even to trustees for public purposes unless they are trustees under a public Act which gives no power to mortgage, because in such a case the contents of such an Act are presumed to be known to the mortgagee (*i*).

The mortgagor is not estopped from setting up against the mortgagee tenancies created by the mortgagee (*k*), except long terms created expressly for his protection (*l*).

A mortgagee of toll houses and gates from commissioners can maintain ejectment (*m*), but not a mortgagee of "the undertaking and tolls," for in the latter case there is no mortgage of land (*n*).

## 2. By Mortgagor.

Where there has been a re-demise to the mortgagor in any of the before-mentioned ways, he can recover posses-

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|--|--|
| <p>(<i>f</i>) <i>Doe v. Vickers</i>, 4 A. &amp; E. 782; <i>Doe v. Clifton</i>, 4 A. &amp; E. 809, 813; <i>Doe v. Stone</i>, 3 C. B. 176; <i>Right v. Bucknell</i>, 2 B. &amp; Ad. 278; <i>Hermitage v. Tomkins</i>, 1 Ld. Raym. 729; <i>Trevivan v. Laurance</i>, 1 Salk. 276; <i>Doe v. Webber</i>, 3 B. N. C. 922; <i>Heath v. Crealock</i>, 10 Ch. 22; <i>General Finance Co. v. Liberator</i>, 10 Ch. D. 15.</p> <p>(<i>g</i>) <i>Doe v. Clifton</i>, <i>supra</i>; <i>Doe v. Stone</i>, <i>supra</i>; <i>Taylor v. Needham</i>, 2 Taunt. 278; but see <i>Doe v. Powell</i>, 1 A. &amp; E. 531.</p> <p>(<i>h</i>) <i>Right v. Bucknell</i>, 2 B. &amp;</p> | <p>Ad. 278; <i>General Finance Co. v. Liberator</i>, <i>supra</i>.</p> <p>(<i>i</i>) <i>Doe v. Horne</i>, 3 Q. B. 757; <i>Fairtitle v. Gilbert</i>, 2 T. R. 169, 171; <i>Doe v. Hares</i>, 4 B. &amp; Ad. 435, 440.</p> <p>(<i>k</i>) <i>Doe v. Lewis</i>, 13 M. &amp; W. 241.</p> <p>(<i>l</i>) <i>Doe v. Kensington</i>, 8 Q. B. 429.</p> <p>(<i>m</i>) <i>Doe v. Booth</i>, 2 B. &amp; P. 219; <i>Doe v. Lediard</i>, 4 B. &amp; Ad. 137; <i>Doe v. Penfold</i>, 3 Q. B. 757.</p> <p>(<i>n</i>) <i>Doe v. St. Helens</i>, 2 Q. B. 364; <i>Doe v. Booth</i>, <i>supra</i>.</p> |
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sion of the premises from the mortgagee or any other person during its continuance (o).

Judicature  
Act, 1873,  
s. 25, sub-s. 5.

The Judicature Act 1873 (p), s. 25, sub-s. 5, provides that a mortgagor entitled for the time being to possession or receipt of rents may, unless the mortgagee has given notice of his intention to take possession, sue for possession or for the rent of the land in his own name only. This provision will enable a mortgagor in possession to recover possession from tenants who entered before the mortgage, unless the mortgagee has given notice of his intention to take possession.

### 3. *Staying Proceedings by a Mortgagee.*

Mortgagee  
may pursue  
all his  
remedies.

Mortgagees who had advanced money on the security of the mortgaged property could always make use of all their remedies against the mortgagor at one and the same time, and therefore actions for foreclosure were, as a rule, commenced in Equity, while an action for ejectment was also started at Common Law (r).

No relief at  
law.

The Courts of Law had formerly no power to compel a mortgagee, who had brought his action to recover possession of the mortgaged premises, to accept the principal monies and interest due on the mortgage and costs, or to stay proceedings in the action.

Courts of  
Equity stayed  
proceedings  
at law.

The Courts of Equity had, however, always jurisdiction, when a foreclosure or redemption action was pending, to stay proceedings in actions of ejectment upon certain terms. These terms were usually that the principal sum due on the mortgage, with interest and costs, should be paid (s),

(o) *Ante*, p. 130 ; *Doe v. Goldwin*, 2 Q. B. 143.

(p) 36 & 37 Vict. c. 66. See App. B, p. 352. See *Fairclough v. Marshall*, 4 Ex. D. 37.

(r) *Kinnaird v. Trollope*, 39

Ch. D. 636 ; *Palmer v. Hendrie*, 27 Beav. 349, 28 Beav. 341.

(s) *Schoole v. Sale*, 1 Sch. & Lef. 176 ; *Herries v. Griffiths*, 2 W. R. 72 ; *Paynter v. Carew*, Kay. 36, app.



or that the mortgagor should give security to redeem the mortgage (*t*), or consent to abide by any order that might be made in the foreclosure action (*u*), without prejudice to other defendants if any (*x*); but the Court would not stay on a mere agreement to pay the principal, &c., at a future day, however near (*y*).

A mortgagor, therefore, who was anxious to have the proceedings in ejectment against him stayed, was obliged to have recourse to a Court of Equity for the purpose.

To remedy this an Act of Parliament was passed which enabled the Courts of Common Law to stay proceedings in any action of ejectment by the mortgagee, on payment by the mortgagor of all principal monies, interest, and costs of any suit upon such mortgage (*z*).

Extended to  
Common Law  
Courts by  
7 Geo. 2,  
c. 20.

The effect of that Act (*a*) was that, in an action for ejectment by the mortgagee, where no suit to foreclose or redeem was pending, if the mortgagor defended and paid to the mortgagee, or in case of his refusal, into Court, the principal, interest, and all costs expended in any suit on such mortgage (*b*), the whole to be computed by the Court, such monies were to be taken in full satisfaction of the mortgage debt, and the Court would thereupon discharge the mortgagor, and order the mortgagee to reconvey the property and return the deeds. If, however, a suit to foreclose was pending, the Court might, if the defendant applied in that suit and admitted the plaintiff's title, make the same decree that could have been made had the action gone to trial (*c*).

Effect of  
7 Geo. 2,  
c. 20.

(*t*) *Booth v. Booth*, 2 Atk. 342.

(*u*) *Langridge v. Payne*, 2 J. & H. 423; *Praed v. Hull*, 1 Sim. & S. 331.

(*x*) *Paine v. Edwards*, 8 Jur. N. S. 1200.

(*y*) *Paynter v. Carew*, Kay. 36, app.

(*z*) 7 Geo. 2, c. 20.

(*a*) 7 Geo. 2, c. 20, s. 1.

(*b*) *Sutton v. Rowlings*, 3 Exch.

407.

(*c*) S. 2.

C. L. P. Act,  
1852.

This Act was practically re-enacted by the Common Law Procedure Act, 1852 (*d*), ss. 219, 220, which sections have since been repealed by the Statute Law Revision Act, 1883 (*e*). The Act, therefore, of 7 Geo. 2, c. 20, remains, though its importance is almost entirely taken away by the Judicature Act, 1873 (*f*). It may, however, be useful to refer to a few decisions upon it.

Act does not  
apply where  
notice given  
under s. 3.

This Act does not apply where a mortgagee has given a notice in writing (*g*) to the mortgagor, insisting that he has no right to redeem, or that the premises are chargeable with other sums than those which appear by the deed, or are admitted, nor where the right to redeem is controverted between the defendants, nor where a subsequent incumbrancer would be prejudiced (*h*). It only applies where the right to redeem is undisputed (*i*), and where money is due on the security (*k*). It does not apply where the mortgagor has agreed to sell the equity of redemption to the mortgagee, and has refused to complete the sale (*l*), unless it be because the mortgagee did not tender the conveyance for execution by the mortgagor (*m*); nor where the mortgagor has given a bond to pay the money, which bond is a lien on the lands, and the mortgagee insists on payment of it (*n*); nor where the mortgagor was in contempt (*o*); nor where other claims

To what the  
Act applies.

To what it  
does not  
apply.

(*d*) 15 & 16 Vict. c. 76.

(*e*) 46 & 47 Vict. c. 49.

(*f*) 36 & 37 Vict. c. 66, s. 24.

(*g*) See *Goodtitle v. Lonsdown*, 3 Anstr. 937; *Doe v. Louch*, 6 D. & L. 270, 274; *Goodtitle v. Bishop*, 1 Y. & J. 344; *Huson v. Hewson*, 4 Ves. 105; but see *Filbee v. Hopkins*, 6 D. & L. 264.

(*h*) S. 3.

(*i*) *Doe v. Louch*, 6 D. & L. 270; *Goodtitle v. Bishop*, 1 Y.

& Jer. 344.

(*k*) *Sands to Thompson*, 22 Ch. D. 614.

(*l*) *Goodtitle v. Pope*, 7 T. R. 185.

(*m*) *Skinner v. Stacey*, 1 Wils. 80.

(*n*) *Felton v. Ash*, Barn. 177; *Archer v. Snapp*, 3 Str. 1107.

(*o*) *Hewitt v. Macartney*, 13 Ves. 560.

besides foreclosure were made against the mortgagor (*p*); nor where the mortgagor has not appeared (*q*), but if judgment is obtained by default against a tenant of the mortgagor, the proceedings may be set aside to enable the mortgagor to appear and defend as landlord and claim relief under the statute (*r*); nor where the mortgagee is in possession or has attempted to exercise his power of sale (*s*). But it does apply even though a second mortgagee gave a first mortgagee notice not to deliver up the deeds to the mortgagor (*t*).

The mortgagor must pay to the mortgagee, or into Terms. Court, the principal, interest, and all costs expended in any suit on such mortgage (*u*), all such costs being taxed as between party and party (*x*); but not interest from the date of the application until reconveyance, if the delay arise through the mortgagee's default (*y*), nor the cost of the mortgage deed (*z*), nor any collateral debt (*a*). In the Courts of Equity the "costs" which a mortgagor would be compelled to pay upon redeeming included much more.

The application may be made by anyone who has a By whom  
application  
made. clear right to redeem (*b*), as, for instance, a purchaser of the equity of redemption (*b*), but not by a tenant of the mortgagor (*c*), nor by the trustee in bankruptcy of the

(*p*) *Bastard v. Clarke*, 7 Ves. 489.

(*q*) *Doe v. Clifton*, 4 A. & E. 809.

(*r*) *Doe v. Roe*, 4 Taunt. 887.

(*s*) *Sutton v. Rawlings*, 3 Exch. 407.

(*t*) *Dizon v. Wigram*, 2 Cr. & Jer. 613.

(*u*) S. 1.

(*x*) *Dos v. Capps*, 3 B. N. C. 768.

(*y*) *Jordan v. Chowns*, 8 Dowl. 709.

(*z*) *Doe v. Steel*, 1 Dowl. 359; see Coote on Mortgages, p. 767 (5th ed.); *Sutton v. Rawlings*, 3 Exch. 407.

(*a*) *Doe v. Steel*, *supra*; *Archer v. Snapp*, 2 Str. 1107.

(*b*) *Goodtill v. Bishop*, 1 Y. & Jer. 344; *Archer v. Snapp*, *sup.*

(*c*) *Doe v. Roe*, 4 Taunt. 887.

mortgagor without the bankrupt's consent (*d*). If the mortgagor has assigned his equity of redemption, he can still take advantage of the statute if proceeded against under the covenants (*e*).

Where made  
and when.

The application may be made either to the Court or in Chambers (*f*), but must be made before the mortgagee is entitled to issue execution (*g*).

Judicature  
Act, 1873.

The former jurisdiction in Equity was not affected by this Act (*h*), which merely enabled the Courts of Law to give relief to a somewhat similar, but lesser (*i*), extent than that which Equity had always given, the second section referring to Courts of Equity being merely incidental and unnecessary. Now since the passing of the Judicature Act, 1873 (*k*), if a defendant claims to be entitled to relief upon any equitable ground, the Courts of Law or Equity will give such ground of relief the same effect as the Court of Chancery would have given in any proceeding instituted for the purpose in that Court before the Act (*l*).

The effect of this is to render the above statute (*m*) almost inoperative, and to enable a mortgagor to plead by way of equitable defence to the action of ejectment any matter which he might have made use of as a ground for asking for relief, had he been proceeding formerly in Equity (*n*). The Courts of Law will then give the same relief as the Courts of Equity formerly could have done ;

(*d*) *Garth v. Thomas*, 2 Sim. & St. 188. 270 ; *Praed v. Hull*, 1 Sim. & S. 331.

(*e*) *Kinnaird v. Trollope*, 39 Ch. D. 636. (*i*) *Sutton v. Rawlings*, 3 Exch. 407.

(*f*) *Lawrence v. Hogben*, 26 L. J. Ex. 55. (*k*) 36 & 37 Vict. c. 66.

(*g*) *Amis v. Lloyd*, 3 V. & B. 15. (*l*) S. 24, sub-s. 2. See App. B., p. 350.

(*h*) *Doe v. Louch*, 6 D. & L. 15. (*m*) 7 Geo. 2, c. 20.

(*n*) See *ante*, p. 138.

but the nature of that relief must, of course, depend upon the circumstances of each particular case.

The Courts have also had given to them by the same Act (o) a discretionary power to stay proceedings, either generally, or so far as is necessary for the purpose of justice, in any cause or matter before them, on the application of any person who could formerly have applied or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule, or order contrary to which all or any of the proceedings in such cause or matter have been taken (o). Power to stay proceedings.

The application must be made to that Division of the High Court in which the action sought to be stayed is pending, though in practice it is sometimes made at Chambers (p).

The object of this enactment is to give the Courts of Law power to stay actions improperly brought, or the prosecution of which Equity would have restrained by injunction (q), but it does not give them power to restrain an action of ejectment merely on account of the existence of a suit for administration in Chancery (r).

The old rule that Equity could restrain proceedings at Common Law is now abolished, as judges of one Division can no longer restrain actions pending in another Division (s).

If, then, a foreclosure action is pending in Equity, and an action of ejectment at Common Law, application can be made in either Division to stay the proceedings in the action in that division, or the existence of the foreclosure

(o) Judicature Act, 1873, s. 24, sub-s. 5.

(p) *Garbutt v. Fawcus*, 1 Ch. D. 155; Annual Practice, p. 29 (ed. 1894).

(q) *Crowle v. Russel*, 4 C. P. D. 186.

(r) S. C.

(s) *Garbutt v. Fawcus*, 1 Ch. D. 155.

action may be relied upon by way of equitable defence to the Common Law action ; or either action may be transferred to the other Division, when the two actions can be consolidated or tried together (*t*).

(*t*) *Smith v. Whichcord*, 24 W. R. 900.

## CHAPTER XIII.

### BY TENANT BY ELEGIT AND PURCHASER UNDER FL. FA.

THE sheriff can, under a writ of *elegit*, seize and deliver to a judgment creditor all the lands, tenements, and hereditaments of any tenure of which the debtor or any person in trust for him is seised or possessed, or over which he has any disposing power which he might without the assent of any other person exercise for his own benefit (*a*) at the time the writ is executed (*b*); until the Act 1 & 2 Vict. c. 110, only a moiety of the debtor's lands could be seized under a writ of *elegit* (*c*). The sheriff cannot seize lands mortgaged by the debtor (*d*), for a mortgagee is not a trustee for the mortgagor within the meaning of 1 & 2 Vict. c. 110 (*e*); or lands of which some person is seized in trust for the debtor and another person (*f*), as the Act only applies when a trustee is seized for the debtor solely; or an estate in remainder (*g*).

What can be seized under *elegit*.

The chattel interests in land, that is, leaseholds or terms of years, of the debtor may still be seized under a

Leaseholds.

- (*a*) 1 & 2 Vict. c. 110, s. 11; Ch. D. 275.  
*Harris v. Davison*, 15 Sim. 128. (*e*) S. 11.  
 (*b*) 27 & 28 Vict. c. 112, s. 1. (*f*) *Doe v. Greenhill*, 4 B. &  
 (*c*) *Doe v. Parry*, 13 M. & W. Ald. 684; *Harris v. Pugh*, 4  
 356; *Sherwood v. Clark*, 15 M. & Bing. 335.  
 W. 764; 13 Edw. I. c. 18. (*g*) *Re South*, 9 Ch. 369;  
 (*d*) *Re Newcastle*, 8 Eq. 700; *Hatton v. Haywood*, 9 Ch. 229.  
*Anglo-Italian Bank v. Davies*, 9

writ of elegit (*h*), or they may be seized and sold by the sheriff under a writ of *fi. fa.* (*i*).

How possession obtained.

The sheriff does not usually put the execution creditor, or the purchaser under a *fi. fa.*, into actual possession (*j*), though he may do so (*k*), and he cannot do so by force or where a person other than the judgment debtor is in possession (*k*); therefore it is generally necessary for the execution creditor, or the purchaser under a *fi. fa.*, to bring an action to recover possession. The return to the writ of elegit, or the sheriff's assignment after a sale under a *fi. fa.*, vests the legal estate in the creditor, or in the assignee (*l*).

Proof of title of tenant by elegit.

A plaintiff seeking to recover possession as tenant by elegit, or through a tenant by elegit, must prove the judgment, the writ of elegit issued upon it, the sheriff's inquisition, and perhaps the return thereon by which the land was delivered over (*m*).

Bankruptcy Act, 1883, s. 45.

By the Bankruptcy Act, 1883 (*n*), a creditor who has issued execution against the lands of a debtor cannot retain the benefit of the execution against the debtor's trustee in bankruptcy, unless he has completed the execution by seizure of the land, or, in the case of an equitable interest, by the appointment of a receiver (*o*), before the date of the receiving order, or of notice of the presentation of a bankruptcy petition by or against the debtor or of an available act of bankruptcy committed by the debtor. If the land has been seized and delivered under the elegit the execution creditor is protected, though the

(*h*) *Richardson v. Webb*, 1 M. B. R. 40. See Bankruptcy Act, 1883, s. 146.

(*i*) *Doe v. Hilder*, 2 B. & Ald. 782.

(*j*) *Taylor v. Cole*, 3 T. R. 292; *Lowthal v. Tonkins*, 2 Eq. Ca. Abr. 380.

(*k*) *Rogers v. Pitcher*, 6 Taunt. 202, 206.

(*l*) *Hatton v. Haywood*, 9 Ch. 229; *Lowthal v. Tonkins*, ante.

(*m*) B. N. P. 102; *Ramsbottom v. Buckhurst*, 2 M. & S. 565.

(*n*) 46 & 47 Vict. c. 52.

(*o*) S. 45.



return to the writ may not have been made until after a bankruptcy petition has been presented against the debtor (*p*).

The inquisition is conclusive against the judgment debtor, and he cannot set up the title of any third person to the lands (*q*); but it is not conclusive against a stranger, who may dispute its correctness (*r*); in the latter case, if the plaintiff shows a good *prima facie* title in the execution debtor at the time the writ was executed, the onus is on the person in possession to show that he had some prior title (*s*).

Effect of  
inquisition.

The return to the inquisition is sufficient if it describes the debtor's lands in any manner which will identify them, and it need not now describe them by metes and bounds, as was necessary before the Act 1 & 2 Vict. c. 110 (*t*).

Return to  
inquisition.

The purchaser under a *fi. fa.* need only prove the *fi. fa.*, and the sheriff's assignment, without proving the judgment, when he is seeking to recover possession from the execution debtor (*u*); but he must prove the judgment if he is himself the execution creditor (*x*), or if, in any case, he is seeking to recover possession from a stranger (*y*). If the sheriff has sold without executing a proper assignment of the term, the term remains vested in the execution debtor, and the purchaser cannot recover possession (*z*). The sale followed by a proper assignment is valid and

Proof of title  
by purchaser  
under *fi. fa.*

- (*p*) *Re Hobson*, 33 Ch. D. 493.      (*u*) *Doe v. Murless*, 6 M. & S. 110.  
 (*q*) *Martin v. Smith*, 27 L. J. Ex. 317.      (*x*) *Doe v. Smith*, 2 Stark. 199.  
 (*r*) *Chatfield v. Parker*, 8 B. & C. 543; *Doe v. Owen*, 2 C. & J. 71.      (*y*) *Lake v. Billers*, 1 Ld. Raym. 733; *Martyn v. Podger*, 5 Burr. 2631.  
 (*s*) *Doe v. Owen*, *ante*; *Doe v. Hilder*, 2 B. & Ald. 782.      (*z*) *Doe v. Jones*, 9 M. & W. 372; *Playfair v. Musgrove*, 14 M. & W. 239. See Chap. 1. W. 356.

effectual to pass the property to the purchaser, even if the *fi. fa.* is afterwards set aside for irregularity (a). The plaintiff must also prove that the debtor was possessed for a term of years, or as tenant (b).

Land in occupation of tenants.

If the lands are held by a tenant under a demise prior to the execution of the writ, the *elegit* creditor or the purchaser under the *fi. fa.* is only put in the position of a landlord (c) and cannot eject such tenant; but tenants let in subsequent to the execution of the writ can be ejected (d).

Position of tenant by *elegit*.

A tenant by *elegit* is entitled to hold only until his judgment and costs (e) of execution are satisfied, and the court out of which the execution issued can order an inquiry, and that the tenant by *elegit* shall give up possession if the inquiry shows that his judgment has been satisfied (f).

Registration of title of tenant by *elegit*.

Writs and orders affecting land issued or made by any court to enforce a judgment statute or recognisance, and any order appointing a receiver or sequestrator of land, must be registered at the office of the land registry in the name of the person whose land is thereby affected (g). Registration ceases to have effect after five years, but may be renewed for a subsequent period of five years. Such writs and orders and every delivery in execution or other proceeding taken in pursuance thereof are void as against a purchaser for value unless registered (h).

(a) *Doe v. Thorn*, 1 M. & S. 425.

(b) *Doe v. Murless*, 6 M. & S. 110. See Chap. 21, on Evidence, pp. 227—229.

(c) *Rogers v. Pitcher*, 6 Taunt. 202, 206; *Doe v. Wharton*, 8 T. R. 2; *Taylor v. Cole*, 3 T. R. 292; *Doe v. Evans*, 1 Cr. & M. 455.

(d) See *Doe v. Hilder*, 2 B. & Ald. 782, 785, and 27 & 28 Vict. c. 112, s. 1.

(e) *Mahon v. Miles*, 30 W. R. 123.

(f) *Price v. Varney*, 3 B. & C. 733.

(g) 51 & 52 Vict. c. 51, s. 5.

(h) S. 6.

A purchaser for value includes a mortgagee or lessee or other person who for valuable consideration takes any interest in land, or in a charge on land (*i*). Purchase for value.

Prior to this Act when land had been actually delivered in execution under a writ of elegit or other lawful authority, it was unnecessary to register the judgment, writ, or other process of execution except for the purpose of obtaining a summary order for sale (*k*); but registration is now necessary under the Act of 1888 in order to protect the rights of the execution creditor against a purchaser for value (*l*). Old law.

Where the debtor's interest in the land is of such a nature that it cannot be reached by means of a writ of execution, or can only be reached in that manner with difficulty, recourse must be had to the process of equitable execution by means of a receiver (*n*). Before the passing of the Judicature Acts the mode of obtaining equitable execution was by issuing a writ of elegit and, without obtaining a return, filing a bill in equity alleging that the plaintiff had issued his writ of elegit, and that owing to legal impediments it could not be enforced at law, and asking for payment of the judgment debt by means of a receiver (*o*). Now a receiver may be appointed in all cases in which it shall appear just or convenient to do so (*p*). Equitable execution.

The order when made is equivalent to a delivery of the land in execution within the meaning of 27 & 28 Vict. Effect of order.

(*i*) S. 4.

(*k*) 27 & 28 Vict. c. 112, ss. 3, 4; *Re Pope*, 17 Q. B. D. 743.

(*l*) 51 & 52 Vict. c. 51.

(*n*) R. S. C. Or. 50, r. 16; *Re Watkins*, 49 L. J. Bank. 7; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275, 291; *Manchester Bank v.*

*Parkinson*, 22 Q. B. D. 173.

(*o*) *Anglo-Italian Bank v. Davies*, *ante*.

(*p*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 8; R. S. C. Or. 50, r. 15 a; *Anglo-Italian Bank v. Davies*, *ante*.

c. 112 (q), and binds the land at once, even though the receiver has not perfected his appointment by giving security (r).

(q) *Re Watkins, Ex parte* 275, 283.

*Evans*, 13 Ch. D. 252; *Anglo-Italian Bank v. Davies*, 9 Ch. D.

(r) *Re Watkins, Ex parte Evans, ante.*

## CHAPTER XIV.

1. *By Devisee*, 151.

2. *By Legatee*, 161.

3. *By Executors and Administrators*, 162.

### 1. *By Devisee of Freeholds.*

A PLAINTIFF who seeks to recover possession of land as a devisee, or through a devisee, must prove the will, the death of the testator, the title of the testator, that he, the plaintiff, is the person named as devisee, and is entitled to an estate in the land under the devise, and that the land claimed is the land devised; also, if he claims through a devisee, his derivative title from such devisee. It is impossible within the scope of this work to enter fully into all these questions. For the law relating to the validity and construction of wills of realty we must refer our readers to the special authorities upon such subjects, and limit this chapter to setting out, and shortly referring to, the terms of the Wills Act, 1837, and discussing a few other points specially relating to actions by devisees for the recovery of land.

Devisee claiming lands. What he must prove.

A will of realty must always be made and executed and be valid according to the law of the country where the land is situate.

Will realty. Lex loci.

Land may now be taken, held, and disposed of by aliens, and a title derived through or under them (a).

Aliens.

(a) 33 Vict. c. 14; 33 & 34 Vict. c. 102; 35 & 36 Vict. c. 39

- The sovereign.** The sovereign can devise realty (b).
- Interpretation of terms.** For the meaning of particular words in the Wills Act, the reader is referred to the Appendix (c), where the Act is set out. We now proceed to give a summary of that Act (d).
- What may be devised.** A testator can now by will dispose of all real and personal property of every tenure and kind which would, upon an intestacy, pass to the heir or to the administrator (e).
- Copyholds.** Copyholds may now be devised without any surrender to the use of the will, and notwithstanding that the testator has not been admitted thereto; and may be so devised whatever the customs of the manor may be (e). Formerly copyholds could not be devised without a surrender to the use of the will, and no one could devise copyholds to which he had not been admitted, except a customary heir. If there has been no surrender to the use of the will, the estate is in the customary heir until the admittance of the devisee (e). The will, or an extract showing the devise, must be entered on the court rolls; and though trusts need not be entered, the entry must say if the estate is subject to the trusts of the will, if any (f).
- Wills or extracts must be entered on Court Rolls.**
- Estates pur autre vie.** Estates *pur autre vie* (g) of any tenure, whether corporeal or incorporeal hereditaments, and whether there be a special occupant or not, can be disposed of by will (h); if freehold and not disposed of by will, they will descend
- (b) 39 & 40 Geo. III. c. 88, s. 4.      441; *Lacey v. Hill*, 19 Eq. 346, 351.
- (c) App. B, pp. 320—331.      (f) S. 5.
- (d) 7 Will. IV. & 1 Vict. c. 26.      (g) S. 3; *Chatfield v. Berchtold*, 7 Ch. 192.
- (e) The Wills Act, 1836, 7 Will. IV. and 1 Vict. c. 26, s. 3;      (h) S. 6; *Reynolds v. Wright*, *R. v. Garland*, L. R. 5 Q. B. 269; 25 Beav. 100.
- Garland v. Mead*, L. R. 6 Q. B.

as an ordinary freehold in fee to the heir; if there be no heir, then the estate passes to the executor or administrator of the person who had the grant, and must be administered by him as personal estate (*hh*).

Contingent, executory or other future interests can now be devised, whether the testator be ascertained or not as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument creating the same or under any disposition by deed or will (*i*); formerly a contingent interest was not devisable if the person who was to take it was not ascertained before the contingency happened (*k*).

Contingent  
and future  
estates.

All rights of entry are now devisable (*l*); and a person having possession of land without other title has a devisable interest (*m*).

Rights of  
entry.  
Possessory  
title.

A will now speaks and takes effect as if executed immediately before the testator's death, unless a contrary intention appears, and therefore property acquired after the execution of the will can be devised (*n*). Formerly a will of realty could operate only on the property which the testator had at the date of its execution, and not upon any subsequently acquired property (*o*). Sect. 24, however, merely deals with the disposition of the testator's property, and in no way affects the objects of his bounty, or his testamentary capacity (*p*).

A will now  
speaks from  
testator's  
death.

(*hh*) *Reynolds v. Wright*, 25 Beav. 100.

see *Blight v. Hartnoll*, 19 Ch. D. 294.

(*i*) *Thomas v. Jones*, 2 J. & H. 475, 32 L. J. Ch. 139; *Selwyn v. Selwyn*, 2 Burr. 1131; *Roe v. Jones*, 1 H. Bl. 30; *Goodtitle v. Wood*, Willes, 211.

(*l*) S. 3.

(*m*) *Asher v. Whitlock*, L. R. 1 Q. B. 1.

(*n*) Ss. 3, 24.

(*k*) *Doe v. Tomkinson*, 2 M. & S. 165; *Thomas v. Jones*, *supra*;

(*o*) *Thomas v. Jones*, 2 J. & H. 475.

(*p*) *Langdale v. Briggs*, 8 De G.

Infant.

An infant under twenty-one cannot make a will (*q*).

Married women.

The Wills Act does not give a married woman any greater testamentary power than she had before the Act (*r*). The Married Women's Property Act, 1882, enables a married woman to dispose by will of any real or personal property, which is her separate property, as if she were a feme sole, without the intervention of any trustee (*s*); and the Married Women's Property Act, 1893, provides that sect. 24 (*t*) of the Wills Act shall apply to the will of a married woman made during coverture, whether she has any separate property at the time of making the will or not, and that such will need not be re-executed or re-published after the death of her husband (*u*).

Execution and attestation.

A will must be in writing, and signed "*at the foot or end thereof*" (*x*) by the testator or by some one in his presence and by his direction; and such signature must be made or acknowledged by him in the presence of two witnesses present at the same time, who attest and subscribe the will in his presence; no form of attestation is necessary. This section, so far as relates to the words "*at the foot or end thereof*," has been amended by the Wills Amendment Act, 1852, which largely extends the meaning of those words (*y*).

Publication not requisite.

If a will be properly executed no further publication is required (*z*).

Witness.

A will is not invalid by reason of any witness being incompetent to prove its execution (*a*).

M. & G. 39; *Bullock v. Bennett*,  
24 L. J. Ch. 512; *Re Price*, 28  
Ch. 709.

(*q*) S. 7.

(*r*) S. 8; *Thomas v. Jones*, 2 J.  
& H. 475; 32 L. J. Ch. 139.

(*s*) 45 & 46 Vict. c. 75, s. 1.

(*t*) See p. 153.

(*u*) 56 & 57 Vict. c. 63, s. 3.

(*x*) S. 9.

(*y*) 15 & 16 Vict. c. 24. See

App. B, p. 341; *Margary v. Robinson*, 12 P. D. 8.

(*z*) S. 13.

(*a*) S. 14.



A person to whom or to whose husband or wife any gift or beneficial devise is made by the will is not thereby prevented from being a witness, but the gift or devise is void (b). Gifts to attesting witness.

A creditor or the wife or husband of a creditor whose debt is charged on the devised property can, notwithstanding such charge, be a witness (c); so also can an executor (d). Creditor and executor can be witnesses.

A power of appointment by will must be executed in accordance with this Act, and no other formality is necessary, even though additional formalities are required by the power (e). If the power is not in terms a power of appointment by will, it will be duly executed by will, if the will answers the description of the instrument required for the execution of the power (f). This section applies to all powers whether created prior or subsequent to this Act (g). Execution of powers of appointment.

A will is revoked by subsequent marriage, unless the will be in exercise of a power of appointment, and the property would not in default of appointment have passed to the heir, executor, administrator or statutory next of kin of the testator (h); if the will exercises the power of appointment and also disposes of other property of the testator not included in the power, that part of the will which exercises the power is good (i). Revocation by marriage.

No will is revoked by any presumption of an intention on the ground of an alteration in circumstances (k). Not by presumption.

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|---|--|
| (b) S. 15.                                    | (h) S. 18; <i>Re Fitzroy</i> , 1 S. & T. 133; <i>Re Fenwick</i> , L. R. 1 P. & D. 319; Jarman, vol. i., 112. |
| (c) S. 16.                                    |  |
| (d) S. 17.                                    |  |
| (e) S. 10.                                    | (i) <i>Re Russell</i> , 15 P. D. 111;  |
| (f) <i>Taylor v. Mead</i> , 34 L. J. Ch. 203. | <i>Re Fitzroy</i> , 1 S. & T. 133.   |
| (g) <i>Hubbard v. Lees</i> , L. R. 1 Ex. 255. | (k) S. 19. See <i>Re Wells</i> , 42 Ch. D. 646.  |

By another will, &c. ; by burning, &c.

A will or codicil is also revoked by another will or codicil properly executed; by any writing, executed in the same way as a will, which declares an intention to revoke; by burning, tearing, or otherwise destroying the same by the testator, or someone in his presence and by his direction, with the intention of revoking the same (*l*).

Obliterations, alterations, &c.

An obliteration, interlineation or alteration in a will after execution has no effect, except so far as the former words or effect of the will are not apparent, unless it is executed like a will; but a will with an alteration in it is deemed to be duly executed, if it is signed and attested in the margin or opposite or near to the alteration, or at the foot or end or opposite to a memorandum referring to the alteration and written at the end or some other part of the will (*m*). The general rule is, that there is a presumption that alterations on the face of a will were made after execution (*n*), though this presumption may be rebutted by evidence of declarations made before, but not after, execution (*o*).

Revival of <sup>(r)</sup> revoked will.

A will once revoked can only be revived by re-execution, or by a properly executed codicil showing an intention to revive (*p*); and if a will or codicil is partly revoked and afterwards wholly revoked, a subsequent revival will not extend to the portion partially revoked unless a contrary intention appear (*q*).

Subsequent conveyance of property devised.

A subsequent conveyance or other act relating to the property comprised in the will, except a revocation of the will, will not prevent the operation of the will with respect

(*l*) S. 20; Jarman, vol. i., 110 (ed. 5).

(*m*) S. 21.

(*n*) *Re Sykes*, L. R. 3 P. & D. 26.

(*o*) *Re Greenwood* [1892], Prob. 7; *Tyler v. Merchant Taylors*

*Co.*, 15 P. D. 216.

(*p*) S. 22; *Neate v. Pickard*, 2 No. Cas. 406; *Rogers v. Goodenough*, 2 Sw. & Tr. 342.

(*q*) S. 22; *Re Bangham*, 1 P. D. 429; *James v. Shrimpton*, 1 P. D. 431.

to any interest in the property which the testator has power to dispose of by will at the time of his death (*r*). This clause applies to cases where testators, after having devised their estates, make conveyances of them in the nature of fines and recoveries, or when they mortgage the devised estates in fee and afterwards take a reconveyance of them to themselves and a trustee to uses to bar dower, but not to cases where, by a sale of the property, that which it was intended to devise is gone (*r*).

Property comprised in a lapsed or void devise is included in the residuary devise (if any) in a will, unless a contrary intention appears (*s*). Formerly all residuary devises of realty were specific, because the testator could devise only the realty which he had at the date of the will (*t*), and therefore lapsed and void devises did not, as a rule, pass under the residuary devise (*u*). The residuary devise under this section (*s*) must be a devise of a general residue, and not of a distinct and separate residue, as of the residue of property in a particular place, parts of which have already been specifically devised to others (*u*).

Lapsed and  
void devises

A general devise of *land* simply or with a general description, or any other general devise which would describe copyholds or leaseholds if the testator had no freeholds which could be described by it, includes copyholds and leaseholds, or such of them as answer such description, as well as freeholds, unless a contrary intention appears (*x*). Formerly the rule was that if a testator had freeholds and leaseholds a devise of *land* passed the freeholds

General devise  
may include  
copyholds or  
leaseholds.

(*r*) S. 23. *Moor v. Raisbeck*, 12 Sim. 123.

(*s*) S. 25. See *Freme v. Clement*, 18 Ch. D. 499.

(*t*) *Ante*, p. 153.

(*u*) *Re Brown's Trusts*, 1 K. &

J. 522, 527; *Hensman v. Fryer*, 3 Ch. 420; *Springett v. Jennings*, 10 Eq. 488; *Cogswell v. Armstrong*, 2 K. & J. 227, 231.

(*x*) S. 26.

only, but that it passed the leaseholds if he had no freeholds (y).

The section consists of two parts: the first relates to a general devise of "land," and the second, which relates to any other "general devise," was intended to cover cases not included in the first part. The effect of the whole seems to be that "lands" *prima facie* include (z) leaseholds, the onus being now on the person who seeks to prove the contrary; while "real estate" or "freeholds" does not include leaseholds if there is real estate which will answer the description, unless there is something in the will to identify them (a).

General  
devise is  
execution of  
general power.

A general devise or bequest of real or personal estate operates as an execution of any general power of appointment over that estate which the testator may possess, unless a contrary intention appear by the will (b). Formerly this was not so, unless it was clear either from the power itself, or from the nature of the property devised, that the deviser intended it should so operate (c); such an intention was inferred from the fact that the deviser had no real estate except that subject to the power (c). This section applies only to general powers, and leaves unaltered the old law so far as special powers are concerned. It would seem, however, that, having regard to sect. 24 (d), no intention to exercise a special power over real estate can now be inferred from the fact that the tes-

(y) *Rose v. Bartlett*, Cro. Car. 292.

(z) *Butler v. Butler*, 28 Ch. D. 66.

(a) *Jarman*, vol. i., 625; *Moase v. White*, 3 Ch. D. 763; *Prescott v. Barker*, 9 Ch. 174; *Nelson v. Hopkins*, 21 L. J. Ch. 410.

(b) S. 27.

(c) *Lake v. Currie*, 2 De G. M. & G. 536; *Thomas v. Jones*, 2 J. & H. 475; *Re Williams*, 42 Ch. D. 93; *Re Mills*, 34 Ch. D. 186; *Boyes v. Cook*, 14 Ch. D. 53.

(d) *Ante*, p. 153.

tator had no other real estate except that subject to the power (e).

A devise of real estate without words of limitation passes the whole interest of the testator in such estate, unless a contrary intention appear by the will (f). Formerly such a devise passed only a life estate, unless it was clear that the testator intended to pass a larger estate (g). The section only applies to devises of real estate existing and vested in the testator at his death and of which he can then dispose, and does not apply to particular estates created by the will out of his fee simple estates, such as a rent charge or an annuity (h).

Devise without words of limitation.

The words "die without issue," or "die without leaving issue," or "have no issue," or other words importing a want or failure of issue of any person during his life, or at his death, or an indefinite failure of issue, now mean a want or failure of issue in his lifetime or at his death and not an indefinite failure of his issue (i); unless a contrary intention appears by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or his issue, or otherwise (i). This section does not apply where such words import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue (i). Such words were formerly held to create an estate tail which might be barred (k).

Meaning of words "die without issue," &c.

(e) Jarman, vol. i., 641, and cases above.

(f) S. 28.

(g) *Wissen v. Wissen*, 2 Sm. & Gif. 396; *Pennock v. Pennock*, 13 Eq. 144; Jarman, vol. ii., 1135.

(h) *Nichols v. Hawkes*, 10 Hare, 342; *Reay v. Rawlinson*, 29 Beav. 88.

(i) S. 29.

(k) Jarman, vol. ii., 1320; Williams Real Property, p. 232

Devise to trustee passes whole estate.

Unless only for life of beneficiary.

A devise of real estate, other than an advowson, to a trustee or executor, passes the whole interest of the testator in such estate, unless some less estate is given expressly or by implication (*l*); and such a devise to a trustee, where the beneficial interest in the estate or surplus profits is not given to any one for life, or when it is so given, but the trusts may continue beyond such life, passes the testator's whole interest which he had power to dispose of, and not merely an estate determinable when the trusts are satisfied (*m*); the result is that trustees whose estate is not expressly defined by the will, must in every case, and whatever be the nature of the duty imposed upon them, take either an estate for life or the testator's whole estate (*n*).

No lapse in certain cases.

Devise of estate tail.

Devise to issue who die leaving issue.

The devise of an estate tail, or quasi entail, to a person who dies before the testator, but leaves issue inheritable under such entail living at the testator's death, does not lapse, but takes effect as if the devisee had died immediately after the testator, unless a contrary intention appear by the will (*o*). Where real or personal estate is devised or bequeathed by a testator to his issue for an interest not determinable at or before their death, and such issue die in the testator's lifetime leaving issue living at his death, such devise or bequest does not lapse, but takes effect as if the devisee had died immediately after the testator, unless a contrary intention appear by the will (*p*). The section does not make the gift a gift to the issue, but merely makes the gift take effect as if the devisee had died immediately after his testator, and therefore it will pass under the devisee's will, or on his intestacy the exist-

(ed. 17); *Greenway v. Greenway*,  
1 Giff. 131.

(*l*) S. 30.

(*m*) S. 31.

(*n*) Jarman, vol. ii., 1166.

(*o*) S. 32.

(*p*) S. 33.

ence of issue merely preventing a lapse (q). The issue need not be the issue in existence at the devisee's death, but may be any issue, as for instance a grandchild of the devisee, who shall be living at the testator's death (r).

The Wills Act does not extend to wills made before January 1st, 1838, unless re-executed, re-published or revived since that date, and does not extend to an estate *pur autre vie* of a person dying before that date (s). Extent of Act.

A devisee cannot recover possession if he has disclaimed taking any estate in the land devised (t), but a mere disclaimer of title under the will, when he relies on a higher and better title, does not prevent him recovering (u). If he acts as executor or trustee under a will he is not thereby prevented from disclaiming a devise under such will (x). Disclaimer by devisee.

Any deed which sufficiently shows an intention to disclaim is enough (y), and probably a mere parol disclaimer is sufficient (z), but in any case it must be a clear and unequivocal disclaimer of the land (z).

## 2. By Legatee of Leaseholds.

A plaintiff claiming leaseholds as legatee must prove the probate of the will (a), and not the original will as in the case of freeholds, and also the assent (b) of the executor Legatee claiming leaseholds.  
What he must prove.

(q) Jarman, vol. i., 322 (5th ed.).  
*Re Parker*, 1 Sw. & Tr. 523; *Eager v. Furnivall*, 17 Ch. D. 115; *Wisden v. Wisden*, 2 Sm. & Giff. 296.

(r) *Re Parker*, ante.

(s) S. 34.

(t) *Begbie v. Crook*, 2 B. N. C. 70; *Nicloson v. Wordsworth*, 2 Swanst. 365, 371.

(u) *Doe v. Smyth*, 6 B. & C. 112.

(x) *Wellesley v. Withers*, 4 E.

& B. 750.

(y) *Townson v. Tickell*, 3 B. & Ald. 31; *Begbie v. Crook*, 2 B. N. C. 70; *Nicloson v. Wordsworth*, 2 Swanst. 365, 371.

(z) *Townson v. Tickell*, *supra*; *Roberts v. Gordon*, 6 Ch. D. 531; *Doe v. Smyth*, *supra*; *Xenos v. Wickham*, 13 C. B. N. S. 381; *Shep. Touch.* 352.

(a) See p. 240.

(b) See p. 235, for evidence of assent.

Assent of  
executor.

to the bequest. Until such assent the term does not vest in the legatee, but in the executor. By the assent the term is vested in the legatee as from the death of the testator (c). The assent of one of several executors is sufficient, and one of several executors can assent to a bequest to himself (d). Assent to the bequest of a particular estate in a term is an assent to the bequest in remainder (e). Assent before probate is good, even though the assenting executor die without proving, provided that probate is ultimately taken out (f).

### 3. By Executors and Administrators.

Title of  
personal  
representa-  
tives to  
leaseholds.

Executors and administrators are in law assignees of the leasehold estates of the testator or intestate. They can recover possession of any lands or tenements whereof the testator or intestate died possessed or entitled for a term of years (g) or as tenant from year to year (h), provided that the term still continues, and that there has been no assent to a bequest thereof (i).

Title of  
executors.

An executor derives his title from the will itself, and the property vests in him from the death of the testator (k). He may commence an action to recover possession before probate, but the probate, being the only proper evidence of his title, must be produced at the trial (l).

(c) *Saunders's case*, 5 Co. Rep. 12 b. ; *Doe v. Guy*, 3 East, 120.

(d) *Townson v. Tickell*, 3 B. & Ald. 31, 40.

(e) *Stevenson v. Liverpool*, L. R., 10 Q. B. 81.

(f) *Wms. Exors.* 251 (9th ed.) ; *Johnson v. Warwick*, 17 C. B. 516.

(g) *Doe v. Wheeler*, 15 M. & W. 623.

(h) *Doe v. Porter*, 3 T. R. 13 ;

*Doe v. Wood*, 14 M. & W. 682 ;

*Doe v. Bradbury*, 2 D. & R. 706.

(i) *Doe v. Tatchell*, 3 B. & Ad. 675 ; *Johnson v. Warwick*, 17 C. B. 516.

(k) *Woolley v. Clark*, 5 B. & Ald. 744.

(l) *Pinney v. Pinney*, 8 B. & C. 335 ; *Webb v. Adkins*, 14 C. B. 401 ; *Thompson v. Reynolds*, 3 C. & P. 123.



Any one executor may bring an action to recover possession (*m*); or all may join in bringing the action whether they have proved or not (*n*); it is not necessary that all who have proved should join in bringing the action (*m*).

One executor may recover possession.

An administrator derives his title from the letters of administration, and cannot, therefore, commence an action before the letters have been granted (*o*).

Title of administrator.

Freeholds *pur autre vie*, if not disposed of by will and if there is no special occupant, pass to the executor or administrator (*p*).

Estates *pur autre vie*.

An executor or administrator must prove that the interest of his testator or of the intestate was a chattel interest; the probate of the will or grant of administration; and the death of the testator or intestate (*q*).

What must be proved

(*m*) *Doe v. Wheeler*, 15 M. & W. 623. 3 C. & P. 121; Williams' Exors. p. 342 (9th ed.).

(*n*) *Creswick v. Woodhead*, 4 M. & G. 811; *Walters v. Pfeil*, M. & M. 362. (*p*) Wills Act, 7 Will. 4 & 1 Vict. c. 26, s. 6. See App. B, p. 325. Williams' Exors. p. 601 (9th ed.).

(*o*) *Pratt v. Swaine*, 8 B. & C. 285; *Woolley v. Clark*, 5 B. & Ald. 744; *Morgan v. Thomas*, 8 Exch. 302; *Phillips v. Hartley*, (*q*) *Metters v. Brown*, 1 H. & C. 686.

## CHAPTER XV.

### BY HEIR-AT-LAW.

Old law.

BEFORE the Inheritance Act, a person who claimed as heir-at-law, or through an heir-at-law, must have proved that the ancestor from whom he claimed was actually *seised* of the land, or, in case of a remainder, was the person in whom it first vested by purchase (*a*). The rule of law was that *seisina facit stipitem*.

Inheritance  
Act, 1833.

"Purchaser."

The Inheritance Act (*b*) has now altered this rule as to *seisin* in all descents since 1833. Land now descends in all cases to the heir of the last *purchaser* (*c*). *Purchase* is "possession to which a man cometh not by title of descent" (*d*). The last purchaser is the last person who had a right to the land, who did not acquire his right by descent (*e*), *i.e.*, by reason of consanguinity (*f*); and it is immaterial whether he obtained possession of the land or not (*f*).

The person last entitled to the land is to be considered to be the "purchaser," unless it is proved that he took by descent (*g*). When it is proved that the person last entitled took by descent, then it is to be considered that the person from whom he inherited was the "pur-

(*a*) 3 Co. Rep. 41b; Watk. on Descent, 120; *Ingilby v. Amcotts*, 21 Beav. 585, 593.

(*b*) 3 & 4 Will. 4, c. 106.

(*c*) S. 2; see App. B, p. 317; *Ingilby v. Amcotts*, 21 Beav. 585, 593.

(*d*) Lit. s. 12.

(*e*) S. 2; see App. B, p. 317.

(*f*) S. 1; see App. B, p. 316; *Bickley v. Bickley*, 4 Eq. 216, 220.

(*g*) Ss. 1, 2; see App. B, p. 316.

chaser" (g). In like manner the last person from whom the land is proved to have been inherited is, in every case, considered to be the "purchaser" until the contrary is proved (g).

The heir of a testator to whom the land is devised by will now acquires the land by purchase (h), though formerly, under similar circumstances, he would have taken it by descent, and not by purchase (i). Probably an heir to copyholds, who disclaims all interest as devisee, and takes the lands as heir-at-law upon a lapse, still takes by descent (k).

Devise to heir.

The whole share of a coparcener dying intestate leaving issue descends to that issue, and not to the heir of the person from whom the coparcener inherited (l).

Coparceners.

A person who acquires land by escheat, partition (m), or enclosure, by the effect of which the land becomes part of, or descendible in the same manner as, other land acquired by descent, is not a purchaser (n).

Partition.  
Escheat.  
Inclosure.

A person who conveys lands by any assurance (o) to himself, or to his heirs, is considered to have acquired them as purchaser, by virtue of the assurance (p); but otherwise a person who has inherited does not convert himself into a purchaser, so as to make himself the stock of descent, unless he has absolutely conveyed the land away, so as to divest himself of all interest in it, and has

Conveyance by one to himself or his heirs.

(g) S. 1; see App. B, p. 316.

(h) S. 3; see App. B, p. 317; *Strickland v. Strickland*, 10 Sim. 374; *Heywood v. Heywood*, 13 W. R. 514.

(i) *Biederman v. Seymour*, 3 Beav. 368; *Shelford, R. P. Statutes*, p. 357 (ed. 9).

(k) *Bickley v. Bickley*, 4 Eq. 216.

(l) *Cooper v. France*, 14 Jur. 215; *Paterson v. Mills*, 19 L. J., Ch. 310.

(m) *Doe v. Dixon*, 5 A. & E. 834.

(n) S. 1; see App. B, p. 316.

(o) S. 1 defines "assurance;" see App. B, p. 316.

(p) S. 3; see App. B, p. 317.

subsequently taken it back as a new estate upon another transaction, and by another conveyance (*q*).

Limitation to  
heirs as  
purchasers.

Where a person acquires land by purchase, under a limitation to the heirs or heirs of the body of any of his ancestors contained in an assurance (*r*) or will, such land will descend as if the ancestor named in the limitation had been the purchaser (*s*). This section does not apply if the limitation is to the heir, in the singular number (*t*).

Default of  
heirs of  
"purchaser."

In the case of the total failure of the heirs of the last purchaser, the descent is to be traced from the person last entitled, by any means, to the land (*u*), whether he obtained possession of the land or not (*x*).

Brothers and  
sisters.

No brother or sister is now considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister is now traced through the parent (*y*). Before the Act the descent between brothers and sisters was considered to be immediate, and not to be traced through the common ancestor (*z*).

Lineal an-  
cestors.

A lineal ancestor can now be heir to any of his issue, and if the purchaser has no issue his nearest lineal ancestor is the heir (*a*). It was an old maxim that an inheritance might lineally descend, but not ascend (*b*), and therefore the father could not be heir immediately to the son (*c*).

(*q*) *Nanson v. Barnes*, 7 Eq. 250; *Davis v. Kirk*, 2 K. & J. 391; *Heywood v. Heywood*, 13 W. R. 514.

(*r*) *Ante*, p. 165.

(*s*) S. 4. See App. B, p. 318; *Mandeville's case*, Co. Lit. 26 b; *Southcot v. Stowell*, 1 Mod. 226, 237; *Wright v. Vernon*, 2 Drew, 439.

(*t*) *Winter v. Perratt*, 9 Cl. & F. 606.

(*u*) 22 & 23 Vict. c. 35, ss. 19,

20, passed in consequence of the decision in *Doe v. Blackburn*, 1 M. & Rob. 547.

(*x*) Inheritance Act, s. 1. See App. B, p. 316.

(*y*) S. 5. See App. B, p. 318.

(*z*) *Collingwood v. Pace*, 1 Vent. 413; *Kynnaired v. Leslie*, L. R. 1 C. P. 389.

(*a*) S. 6; see App. B, p. 318.

(*b*) Co. Lit. 11 a.

(*c*) *Cowper v. Cowper*, 2 P. Wms. 720, 734.

The paternal ancestors now inherit before the maternal ancestors; and the male paternal ancestors before the female paternal ancestors; and the male maternal ancestors before the female maternal ancestors (*d*).

Male line preferred to female.

The mother of the more remote male ancestor, whether paternal or maternal, is to be preferred to the mother of the less remote (*e*).

Mother of more remote male ancestor preferred.

The half-blood inherit next after any relation in the same degree of the whole blood, where the common ancestor is a male, and next after the common ancestor where such common ancestor is a female (*f*). The old rule of law excluded the half-blood from taking by descent, subject to some exceptions and qualifications (*g*).

Half-blood.

Descent can now be traced through an attainted person after his death (*h*); this was not the case formerly (*i*). Since 1870, no attainder is caused by any conviction for treason or felony (*k*).

Attainted persons.

The Inheritance Act does not extend to any descent which shall take place on the death of any person dying before January 1st, 1834 (*l*).

Commencement of Act.

The same rules of descent apply to equitable estates as to the legal estates (*m*); and the rules of descent, so far as they relate to descendants, apply to estates tail. The descent of an estate tail was always traced from the last purchaser, that is, from the person to whom the estate tail was first given (*n*).

Equitable estates.

Estates tail.

(*d*) S. 7; see App. B, p. 318.

(*e*) S. 8; see App. B, p. 319.

(*f*) S. 9; see App. B, p. 319.

(*g*) Shelford, R. P. Statutes, p. 362 (ed. 9).

(*h*) S. 10; see App. B, p. 319.

(*i*) Litt. 8 a (c); *Kynnaird v. Leslie*, L. R. 1 C. P. 389.

(*k*) 33 & 34 Vict. c. 23.

(*l*) 3 & 4 Will. 4, c. 106, s. 11.

(*m*) *Trash v. Wood*, 4 My. & Cr. 324; Williams R. P., p. 178 (ed. 17).

(*n*) *Doe v. Whichelo*, 8 T. R. 211; Williams R. P., p. 207 (ed. 17).

Property  
which  
descends.

Land to which the Inheritance Act applies is fully defined in s. 1 (o). A contingent interest in fee, and an executory devise in fee, are descendible interests, and will descend to the heir of the donee dying intestate, though the donee dies before the interest vests (p).

What claim-  
ant must  
prove.

A person claiming land as heir-at-law, or through an heir-at-law, ought to exhaust the possibility of there being a nearer heir of modern existence, and to negative, to the best of his power, the existence of more remote heirs by showing that he can hear nothing of such, after due inquiry and investigation (q); and he must give *prima facie* (r) evidence that the ancestor from whom he claims was entitled to the land. The onus is then thrown upon the defendant to show, either that the claimant is not heir-at-law, or that the ancestor from whom he claims was not entitled at all, or was only entitled by descent (s).

Outstanding  
estate.

The heir must prove that he is entitled to possession, and any outstanding estate in persons claiming under the title through which the heir claims will prevent him recovering possession (t).

Legitimacy.

A person claiming land in England as heir-at-law must be legitimate by the law of England; it is not sufficient for him to be legitimate by the law of the country in which his parents were domiciled (u); and for the same reason an ancestor cannot inherit land in England from a de-

(o) See App. B, p. 316.

(p) *Rider v. Wood*, 1 K. & J. 644; *Goodtitle v. Wood*, Willes, 211; *Ingilby v. Amcotts*, 21 Beav. 585.

(q) *Greaves v. Greenwood*, 2 Ex. D. 289; *Richards v. Richards*, 15 East, 294, note; *Doe v. Wolley*, 8 B. & C. 22.

(r) See p. 227 for what is good

*prima facie* evidence.

(s) See p. 164.

(t) *Maddon v. White*, 2 T. R. 159.

(u) *Birtchistle v. Vardill*, 7 Cl. & F. 895; *Dalhousie v. M'Douall*, 7 id. 817; *Munro v. Munro*, 7 id. 842; *Shaw v. Gould*, L. R. 3 H. L. 55, 70.

scendant unless such descendant is legitimate by the law of England (*x*).

Customs of descent are not affected by the Act. The Act does not extend the operation of a custom of descent, nor make any alteration as to the course in which such custom is to be applicable (*y*). Therefore land subject to copyhold, gavelkind, borough English, or any other customary tenure, will still descend according to the custom of such tenures (*y*). By the custom of gavelkind land descends to all sons equally; by the custom of borough English, to the youngest son; land subject to copyhold or other customary tenure descends according to the custom of the manor to which it belongs. After the degree at which the custom ceases to be applicable, the Common Law rules of descent will be applied (*z*).

Customs of descent not affected.

There are some statutory exceptions to the rules of descent. By the Land Transfer Act, 1875 (*u*), upon the death of a bare trustee intestate as to any corporeal or incorporeal hereditaments of which such trustee was seised in fee simple, such hereditaments vest in his legal personal representative, except in the case of lands registered under that Act (*b*). A "bare trustee" is one who has no beneficial interest in the trust property, nor any active duty to perform in respect of it (*c*).

Statutory exceptions to rules of descent.

Bare trustee.

The above enactment was repealed, as to cases of deaths occurring after the 31st of December, 1881, by the Con-

veyancing Act, 1881.

(*x*) *Re Don*, 4 Drew, 194.

(*y*) *Muggleton v. Barnett*, 2 H. & N. 653; *Bickley v. Bickley*, 4 Eq. 216; *Hook v. Hook*, 1 H. & M. 43; *Rider v. Wood*, 2 K. & J. 644.

(*z*) *Hook v. Hook*, *supra*; *Muggleton v. Barnett*, *supra*.

(*a*) 38 & 39 Vict. c. 87, re-

pealing and substantially re-enacting s. 5 of the Vendor and Purchaser Act, 1874, 37 & 38 Vict. c. 78.

(*b*) S. 48.

(*c*) *Morgan v. Swansea*, 9 Ch. D. 582; *Christie v. Ovington*, 1 Ch. D. 279.

Trust and  
mortgage  
estates.

veyancing Act, 1881 (*d*), which enacts that where an estate or interest of inheritance, or limited to the heir as special occupant, in any corporeal or incorporeal hereditaments, is vested on any trust, or by way of mortgage, in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representative (*e*).

Land con-  
tracted to  
be sold.

The same Act also enacts that where, on the death of any person after the 31st of December, 1881, there is a subsisting contract enforceable against his heir or devisee for the sale of any freehold interest descendible to his heirs general, in any land, his personal representatives may convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract (*f*).

(*d*) 44 & 45 Vict. c. 41.

App. B, p. 363.

(*e*) S. 30, sub-ss. 1 and 3;

(*f*) S. 4; App. B, p. 363.



## CHAPTER XVI.

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| <ol style="list-style-type: none"> <li>1. <i>By Trustees of Bankrupt</i>, 171.</li> <li>2. <i>By Grantees of Rent-charge</i>, 173.</li> <li>3. <i>By Guardian of Infants</i>, 175.</li> <li>4. <i>By Infants</i>, 176.</li> <li>5. <i>By Lunatic and Person of Unsound Mind</i>, 177.</li> </ol> | <ol style="list-style-type: none"> <li>6. <i>By Joint Tenants, Tenants in Common, and Co-parceners</i>, 177.</li> <li>7. <i>By Parson</i>, 178.</li> <li>8. <i>By Churchwardens and Overseers</i>, 180.</li> </ol> |
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### 1. *By the Trustee of a Bankrupt.*

THE Bankruptcy Act of 1883 constitutes the present code in Bankruptcy (*a*), as it affects the land of a bankrupt.

When a person has been adjudicated a bankrupt, all his property passes to and vests in a trustee (*b*).

Lands vest in trustee upon adjudication.

The creditors may appoint a trustee (*c*), but, until a trustee is appointed, the Official Receiver is the trustee, and the bankrupt's property vests in him (*d*). Upon the appointment of a trustee the property passes to and vests in such trustee (*e*). The property passes to the trustee for the time being (*f*). If at any time there is no appointed trustee, the Official Receiver becomes the trustee (*g*).

Appointment of trustee.

All freehold, leasehold, or customary land which belonged to or was vested in the bankrupt at the commencement of the bankruptcy, or which may be acquired by or devolve upon him before his discharge (*h*), vests in the trustee,

What property vests in trustee.

(*a*) 46 & 47 Vict. c. 52.

(*e*) S. 54, sub-s. 2.

(*b*) S. 20, sub-s. 1.

(*f*) S. 54, sub-s. 3.

(*c*) S. 21.

(*g*) S. 87, sub-s. 4.

(*d*) S. 54, sub-s. 1.

(*h*) S. 168, sub-s. 1 ; s. 44.

except property held by the bankrupt upon trust for any other person (*i*), or property which has been extended by the Crown before adjudication (*k*).

Commence-  
ment of  
bankruptcy.

The commencement of the bankruptcy is the time of the act of bankruptcy being committed, upon which the receiving order is made; or, if the bankrupt committed more acts of bankruptcy than one, the time of the first of such acts of bankruptcy committed within three months next preceding the date of the presentation of the petition (*l*).

Certain other property also, such as property which has been fraudulently or voluntarily transferred by the bankrupt, which was not vested in or belonging to the bankrupt at the commencement of the bankruptcy, vests in the trustee (*m*).

Proof of  
adjudication ;

A copy of the London Gazette, containing a notice of an order of adjudication, is conclusive evidence of the order having been duly made, and of its date (*n*).

of appoint-  
ment of  
trustee.

The Board of Trade certifies that the trustee has been duly appointed (*o*), and the certificate is conclusive evidence that he has been duly appointed (*p*). His appointment takes effect from the date of the certificate (*q*). He may commence an action before the certificate has been given, but must produce it at the trial, dated prior to the issue of the writ (*r*).

The certificate, for the purposes of any law requiring the registration, enrolment, or recording of conveyances or assignments of property, is to be deemed to be a convey-

(*i*) S. 44, sub-s. 1.

(*k*) *Ex parte Postmaster-General*, 10 Ch. D. 595.

(*l*) S. 43.

(*m*) Ss. 45, 47—49.

(*n*) S. 132.

(*o*) S. 21, sub-s. 2.

(*p*) S. 138.

(*q*) S. 21, sub-s. 4.

(*r*) *Kelly v. Morray*, L. R. 1 C. P. 667; *Carrick v. Ford*, L. R. 4 Ch. 247.

ance or assignment of property, and may be registered, enrolled, and recorded accordingly (s).

The trustee is not compellable to be admitted to pro- Copyholds.  
 perty of copyhold or customary tenure, but may deal with it as if it had been duly surrendered to such uses as he might appoint, and his appointee shall be admitted accordingly (t).

The trustee may, with the permission of the committee of inspection (u), or of the Board of Trade if there be no committee (x), sue for the recovery of land of the bankrupt which has vested in him. He sues in his official name of "the trustee of . . . a bankrupt" (y). May sue with leave.

If the trustee has disclaimed any property, as he may Disclaimer.  
 do under the Act (z), he cannot afterwards sue to recover possession of it.

## 2. By Grantee of Rent-charge.

The grantee of a rent-charge, with a power to enter and receive the rents and profits when the rent-charge is in arrear, may bring an action to recover possession of the lands (a). If the instrument creating the charge came into operation before January 1st, 1882, there is only a power to enter if expressly given by the instrument; if it came into operation after that date, there is an implied power to enter, if and as far as a contrary intention is not therein expressed (b). The rent-charger may enter if any portion of the rent-charge is in arrear for the period, if Rent-charge prior to 1882.  
 Conveyancing Act, 1881.

(s) S. 54, sub-s. 4.

(t) S. 50, sub-s. 4.

(u) S. 57, sub-s. 2.

(x) S. 22, sub-s. 9.

(y) S. 83.

(z) S. 55, amended by s. 13 of the Bankruptcy Act, 1890, 53 &

54 Vict. c. 71.

(a) *Jemmot v. Cooley*, 1 Saund. 112 c, ed. 1871, p. 132; *Haver-gill v. Hare*, Cro. Jac. 510; *Doe v. Kensington*, 8 Q. B. 429.

(b) Conveyancing Act, 1881, 44 & 45 Vict. c. 41, s. 44.

any, fixed by the instrument (*c*), or, in the case of the implied power, for forty days (*d*).

No demand necessary unless required by instrument.

No previous demand of the arrears is necessary, unless expressly required by the instrument creating the charge (*e*); but, if necessary, it must be made according to the strict rules of the Common Law (*f*).

Rent-charger can hold until arrears paid.

The right of the rent-charger is only to keep possession until the arrears of the charge are satisfied; and, as soon as they are satisfied, he must give up possession (*g*). If the entry is under the powers given by the Conveyancing Act, the rent-charger may keep possession until payment of all costs and expenses occasioned by non-payment of the rent-charge (*h*).

Who can enter.

This right of entry was construed strictly, and was not extended to any person to whom the right was not clearly given by the instrument creating the charge (*i*). Now, when the instrument creating the charge came into operation after January 1st, 1882, any person entitled to receive a rent-charge has a right to enter, if and as far as a contrary intention is not expressed (*k*).

Right passes to representatives.

If a rent-charger dies after having entered into possession, and before the arrears for which he entered are satisfied, the right to possession until such satisfaction passes to his personal representatives (*l*).

Who may be ejected.

All persons claiming under a title subsequent to the instrument creating the charge may be ejected (*m*).

(*c*) *Havergill v. Hare*, 5 Cro. Jac. 510.

(*d*) Conveyancing Act, 1881, s. 44, sub-s. 3.

(*e*) *Doe v. Horsley*, 1 A. & E. 766.

(*f*) See p. 73.

(*g*) *Hooper v. Cooke*, 25 L. J. Ch. 62, 467; *Doe v. Horsley*, *supra*.

(*h*) S. 44, sub-s. 3.

(*i*) *Hassell v. Gouthwaite*, Willes, 500; *Havergill v. Hare*, 5 Cro. Jac. 510.

(*k*) Conveyancing Act, 1881, s. 44.

(*l*) *Doe v. Weaver*, 2 C. & K. 754.

(*m*) *Doe v. Boulter*, 6 A. & E. 675.

The Common Law Procedure Act, 1852 (*n*), does not apply to an action to enforce a right to enter when a rent-charge is in arrear (*o*). C. L. P. Act, 1852, s. 210.

### 3. *By Guardians of Infants.*

Guardians of infants are of two kinds, guardians in socage, and testamentary guardians. A guardianship in socage arises when a title to the legal estate in socage lands has descended on an infant under the age of fourteen years (*p*). The guardian in socage is the next of blood to whom the inheritance cannot possibly descend (*q*), and his guardianship continues until the infant has attained the age of fourteen years (*r*). Two kinds of guardians.  
In socage.

A testamentary guardian is one appointed by the father of an infant, pursuant to 12 Car. II. c. 24, ss. 8, 9, by deed or will. His guardianship continues until the infant attains the age of twenty-one years (*s*), or, if a female, marries under that age (*t*). His power is the same as that of a guardian in socage (*u*). If more than one are appointed, the office survives to the survivor (*x*), and each while living is a complete guardian (*y*). Under this Act only the *father* can appoint a guardian (*z*). Testamentary.

By a recent Act considerable changes have been made 49 & 50 Vict. c. 27.

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|--|---|
| ( <i>n</i> ) S. 210, p. 76.  | Wils. 129.  |
| ( <i>o</i> ) <i>Doe v. Bowditch</i> , 8 Q. B. 973.                           | ( <i>x</i> ) <i>Eyre v. Shaftesbury</i> , 2 P. Wms. 103; <i>Bedell v. Constable</i> , Vaugh. 177. |
| ( <i>p</i> ) Lit. 123; Co. Lit. 87 b.  | ( <i>y</i> ) <i>Eyre v. Shaftesbury</i> , <i>supra</i> ;  |
| ( <i>q</i> ) <i>Id.</i> ; <i>R. v. Inhabitants of Wilby</i> , 2 M. & S. 504. | <i>Gilbert v. Schwennck</i> , 14 M. & W. 488.   |
| ( <i>r</i> ) <i>Id.</i>  | ( <i>z</i> ) <i>Ex parte Edwards</i> , 3 Atk. 519; <i>Blake v. Leigh</i> , Amb. 305;              |
| ( <i>s</i> ) S. 8; <i>Ex parte Ludlow</i> , 2 P. Wms. 635.                   | <i>Powel v. Cleanor</i> , 2 Bro. C. C. 500; <i>Ex parte Hopkins</i> , 3 P. Wms. 152.              |
| ( <i>t</i> ) <i>Mendes v. Mendes</i> , 1 Ves. sen. 89.                       |   |
| ( <i>u</i> ) S. 9; <i>Roe v. Hodgson</i> , 2                                 |   |

in the law as to appointment of testamentary guardians (a). On the death of the father of an infant the mother, if surviving, is the guardian of such infant, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father (b).

The Court may in certain events, if it thinks fit, appoint a guardian or guardians to act jointly with the mother (c). The mother may, by deed or will, appoint a guardian to act after the death of herself and the father; and where guardians are appointed by both parents, they are to act jointly (d). In certain cases the mother may nominate a guardian to act jointly with the father, but any such appointment requires the confirmation of the Court (e). Every guardian under this Act has the same powers as guardians appointed under 12 Car. II. c. 24 (f).

Guardians  
can recover  
possession of  
land of infant.

Guardians, both in socage and testamentary, can maintain ejectment for the land of the infant (g); but only when the estate is legal, not when it is equitable merely (h), at any rate before the Judicature Acts (i).

#### 4. *By Infants.*

An infant may bring an action to recover possession of land in his own name (k), even if he has a guardian in socage or a testamentary guardian (l). He usually, however, sues by his next friend; and a defendant can always obtain an order that he shall sue by his next friend (m).

(a) 49 & 50 Vict. c. 27.

(b) S. 2.

(c) S. 2.

(d) S. 3, sub-s. 1.

(e) S. 3, sub-s. 2.

(f) S. 4.

(g) *Wade v. Baker*, 1 Raym. 130; *Doe v. Bell*, 5 T. R. 471.

(h) *R. v. Toddington*, 1 B. &

Ald. 560.

(i) See Chap. 1.

(k) *Doe v. Roberts*, 16 M. & W. 778; *Ex parte Brocklebank*, 6 Ch.

Div. 358.

(l) Ad. Eject. p. 49; *Cole*, Eject. 584.

(m) *Cox v. Wright*, 9 Jur. N. S. 981; Ord. XVI. rr. 16, 18.

### 5. *By Lunatics and Persons of Unsound Mind.*

The committee of the estate of a lunatic is but a bailiff, Lunatic. and has no estate or interest in the land, and an action to recover possession of the land of the lunatic must be brought by the committee in the name of the lunatic (*n*). The committee generally cannot act in the management of the lunatic's estate upon his own responsibility, but must apply to a Master, or to the Lords Justices having jurisdiction in lunacy, for directions (*o*). A lunatic defends by his committee (*p*).

A person of unsound mind sues by his next friend, and Persons of unsound mind. defends by his guardian *ad litem*, appointed for that purpose (*p*).

### 6. *By Joint Tenants, Tenants in Common, and Co-parceners.*

Joint tenants, tenants in common, and co-parceners may Joint tenants, &c., can sue respectively, either all together sue to recover possession together for of the whole of the common property (*q*), or any one or whole or more may sue for his or their undivided share or shares (*r*). separately for shares. In either case he or they must prove the extent of his or their interest: it is not sufficient to prove some interest (*s*).

Generally speaking one joint tenant, tenant in common, Cannot sue each other to recover possession. or co-parcener, cannot maintain an ejectment against his companion, because the possession of the one is the posses-

- (*n*) *Drury v. Fitch*, Hutton, 16; *Cocks v. Darson*, Hob. 215  
(Ed. 1879, p. 376); *Knipe v. Palmer*, 2 Wils. 130.  
(*o*) Elmer's Lunacy Practice, 180—205 (7th ed.).  
(*p*) R. S. C. 1883, Ord. XVI. r. 17.  
(*q*) *Doe v. Read*, 12 East, 57; *Doe v. Fenn*, 3 Camp. 190; *Bover*  
*v. Juner*, 1 Raym. 726.  
(*r*) *Doe v. Chaplin*, 3 Taunt. 120; *Roe v. Lonsdale*, 12 East, 39; *Denne v. Judge*, 11 East, 288; *Doe v. Phillips*, 3 B. & Ad. 753; *Roe v. Dawson*, 3 Wils. 49; *Denn v. Purvis*, 1 Burr. 326; *Doe v. Pearson*, 6 East, 173, 181  
(*s*) *Doe v. King*, 6 Exch. 791.

Unless  
ouster.

sion of the other; and to enable the party complaining to maintain an ejectment there must have been an actual ouster of him (*t*). Actual ouster is when there has been a direct and positive exclusion of one co-owner from the common property, he seeking to exercise his rights therein and being denied the exercise of such rights (*u*). Mere sole possession or perception of rents and profits is no evidence of ouster (*x*), unless very long continued (*y*).

3 & 4 Will. 4,  
c. 27.

Possession  
of one not  
possession  
of other.

By 3 & 4 Will. IV. c. 27, the possession of the entirety, or of more than his undivided share, by one co-owner, is not to be deemed to be the possession of his companion (*z*). From this it would seem that it would be no longer necessary for a plaintiff to prove actual ouster. Under the C. L. P. Act, 1852 (*a*), the defendant could by a special proceeding have raised the defence of non-ouster, but this part of the Act has been repealed (*b*). It is submitted that now a plaintiff need not prove actual ouster (*c*), unless the defendant denies ouster in his defence.

### 7. By Parson.

Proof of title  
by parson.

A parson seeking to recover possession of the rectory or parsonage house, or of the glebe, must, unless he sues as landlord (*d*), show his title by proving presentation, institution, and induction; or collation and induction; or a deed of donation. He need not prove

(*t*) *Culley v. Doe*, 11 A. & E. 1008, 1014; *Oates v. Brydon*, 3 Burr. 1895; *Reading's case*, 1 Salk. 392; Co. Lit. 199 b.

(*u*) Lit. s. 322; *Jacobs v. Seward*, L. R. 5 H. L. 464, 474; *Doe v. Horn*, 3 M. & W. 333; 5 *id.* 564; *Doe v. Bird*, 11 East, 49; *Doe v. Prosser*, 1 Cowp. 217.

(*x*) Co. Lit. 199 b; *Reading's*

*case*, 1 Salk. 392.

(*y*) *Culley v. Doe*, 11 A. & E. 1008, 1014.

(*z*) S. 12; *Culley v. Doe*, *supra*; see p. 208.

(*a*) S. 188.

(*b*) 46 & 47 Vict. c. 49.

(*c*) Ad. Eject. p. 69.

(*d*) See Chap. 5.



the title of a patron (e). If he has been in possession, such possession will be *prima facie* evidence of his title (f).

A parson who has been duly presented, instituted, and inducted may recover possession from another who has previously been presented to the same benefice simoniacally (g).

A sentence of suspension *ab officio et a beneficio* will, so long as it is in force, prevent a parson from recovering possession of house or glebe (h).

At common law a demise by a parson was effectual only so long as he continued incumbent, and his successor could immediately eject the tenant (i). Now, if the demise, not being made under a statute, terminates when the lessor ceases to be incumbent, the lessee can hold until the expiration of the current year of his tenancy, but can then be ejected without any notice (k).

Tenants under demise by predecessor.

When a parson has been in undisturbed possession of the benefice for some time it will be presumed that he has done all that is necessary by law subsequent to institution (l), and he will not be required to prove that he has taken the requisite oaths, &c., according to the Act of Uniformity, unless some evidence to the contrary is given (m).

Presumption from undisturbed possession.

Some evidence must be given that the land sought to be recovered is the property of the benefice (n).

(e) B. N. P. 105.

(k) 14 & 15 Vict. c. 25, s. 1.

(f) *Post*, p. 227.

(l) *Powel v. Milbank*, 3 Wils.

(g) *Doe v. Fletcher*, 8 B. & C. 25.

355, 366; *Monk v. Butler*, 1 Roll. R. 83; *Chapman v. Beard*, 3 Anst. 942.

(h) *Morris v. Ogden*, L. R. 4 C. P. 687, 702.

(m) *Powel v. Milbank*, 2 Wm. Black. 851.

(i) *Doe v. Carter*, Ry. & M. 237.

(n) See *post*, p. 237.

8. *By Churchwardens and Overseers.*

59 Geo. 3,  
c. 12.

Parish  
property vests  
in church-  
wardens and  
overseers.

By 59 Geo. III c. 12, all parish property is vested in the churchwardens and overseers of the poor for the time being (o). Before this Act there was frequently a difficulty in recovering possession of parish lands and houses, owing to the impossibility of proving the title of the churchwardens and overseers who were seeking to recover possession. For instance the reversion of parish property demised by churchwardens and overseers did not vest in their successors without assignment (p).

Quasi-  
corporation.

By the operation of this Act the churchwardens and overseers become a quasi-corporation, but are not made a complete body corporate. They can accept a demise without using any common seal, and a demise to them by their names of office is sufficient (q). There must be officers of both descriptions before the Act will operate to vest parish property in them (r). Neither churchwardens only, nor overseers only, have any title under the Act (s). There must be *two* overseers, but in some cases one churchwarden may be sufficient (r).

What property  
vests in them.

Only lands belonging to the parish (t) for *general* parish purposes, or for those purposes to which poor's rates and church rates are applicable, are by the Act vested in the churchwardens and overseers (u). The Act does not apply to lands devoted to special parish charities (x), nor to

(o) S. 17; see App. B, p. 298.

(p) *Doe v. Clarke*, 14 East, 488.

(q) *Smith v. Adkins*, 8 M. & W. 362.

(r) *Woodcock v. Gibson*, 4 B. & C. 462; *R. v. All Saints, Derby*, 13 East, 143.

(s) *Doe v. Gower*, 17 Q. B. 589; *Phillips v. Pearce*, 5 B. & C. 433.

(t) *Alderman v. Neate*, 4 M. & W. 704.

(u) *Doe v. Hiley*, 10 B. & C. 885; *Doe v. Terry*, 4 A. & E. 274; *Doe v. Cockell*, 4 A. & E. 478.

(x) *A.-G. v. Lewin*, 8 Sim. 366; *Re Paddington Charities*, 8 Sim. 629; *Allason v. Stark*, 9 A. & E. 255.

copyholds (y), nor to any lands which are vested in known existing trustees (z), nor to lands which are granted or demised to churchwardens and overseers jointly with other persons (a).

Although a parish forms part of a union under 4 & 5 Will. IV. c. 76, the parish lands are not divested out of the churchwardens and overseers of such parish, either by that Act, or by 5 & 6 Will. IV. c. 69 (b), and they can still acquire parish property as a quasi-corporation (c).

Where parish forms part of union.

It must be proved that the land sought to be recovered is parish land (d), and that the plaintiffs were the churchwardens and overseers at the time the action was commenced (e). The churchwardens and overseers must each be named (f) in the writ, and must also be described as churchwardens and overseers (g).

What they must prove.

By the same Act (h) the churchwardens and overseers are enabled to recover possession of parish property by summary proceedings before magistrates. By s. 24, if any person who has been permitted to occupy any parish houses or tenements, or who has unlawfully intruded therein, or into any house, tenement, or hereditament belonging to the parish (i), does not quit and deliver up possession to the churchwardens and overseers within one month after notice and demand in writing, such person

Summary proceedings before justices.

(y) *Doe v. Foster*, 3 C. B. 215 ;  
*Re Paddington Charities*, *supra* ;  
*A.-G. v. Lewin*, *supra*.

(z) *Deptford v. Sketchley*, 8 Q. B. 394 ; *Allason v. Stark*, 9 A. & E. 255.

(a) *Uthwatt v. Elkins*, 13 M. & W. 772.

(b) *Doe v. Webster*, 12 A. & E. 442 ; *Worge v. Relf*, 11 L. J. M. C. 125.

(c) *Worge v. Relf*, *supra*.

(d) See Chap. on Evidence, p. 227.

(e) See Chap. on Evidence, p. 238.

(f) *Doe v. Roe*, 4 Dowl. 222.

(g) *Ward v. Clarke*, 12 M. & W. 747.

(h) 59 Geo. III. c. 12, ss. 24, 25 ; see App. B, pp. 291—321.

(i) *Ex parte Vaughan*, L. R. 2 Q. B. 114.

may be summoned before justices, who may by warrant cause possession to be given to the churchwardens and overseers. The notice must be signed by the churchwardens and overseers, or the major part of them, and delivered to the person in possession, or in his absence affixed to some notorious part of the premises. Similar proceedings may, by s. 25, be taken against any person to whom parish lands have been let for his own occupation, who does not quit and deliver up possession at the expiration of his term, and against any person who has unlawfully taken possession of any parish lands or hereditaments.

When s. 24  
applies.

Sect. 24 only applies when the parish property is provided for the habitation of the poor, or is intruded upon, not when it has been let to anyone as a tenant (*k*). A *lunar* month's notice is sufficient (*l*), and it may be served upon some one upon the premises not necessarily the person in possession (*m*). The jurisdiction of the magistrates is not ousted by a claim of title on the part of the person in possession (*n*).

Several statutes have given powers to churchwardens and overseers to acquire lands and houses for the purposes of the Poor Law (*o*). Summary powers of recovering possession of such lands and houses are given (*p*).

They may  
proceed in  
ordinary way.

The churchwardens and overseers are not bound to pursue the remedies given by these Acts, but they may enter and take possession of parish lands without giving any notice,

(*k*) *R. v. Middlesex*, 7 Dowl. B. 66.  
767.

(*l*) *Lacon v. Hooper*, 6 T. R.  
224.

(*m*) *Appleton v. Morrey*, 8 W.  
R. 653.

(*n*) *Ex parte Vaughan*, L. R.  
2 Q. B. 114; *R. v. Bolton*, 1 Q.

(*o*) 59 Geo. III. c. 12, s. 12,  
13; 1 & 2 Will. IV. c. 42, and  
c. 59; 2 & 3 Will. IV. c. 42.

(*p*) 59 Geo. III. c. 12, ss. 24,  
25; see App. B, p. 299; 2 & 3  
Will. IV. c. 42; see App. B, p.  
301.

if they can do so peaceably (*q*) ; or they may bring an action at law.

These provisions for summary proceedings (*r*) are extended to houses and lands vested in or under the management or control of the guardians of the poor of any union or parish (*s*).

Guardians of  
a union.

The Local Government Act, 1894 (*t*), transfers to a rural Parish Council the "powers, duties, and liabilities" of the overseers, or of the churchwardens and overseers, with respect to "the holding or management" of parish property, village greens, or allotments, not belonging to the Church, or held for an ecclesiastical charity (*u*).

Local Govern-  
ment Act,  
1894.

(*q*) *Wildbor v. Rainforth*, 8 B. & C. 4 ; *Fox v. Oakley*, 2 Peake, 214.      (*s*) 5 & 6 Will. IV. c. 69, s. 5 ; 1 & 2 Will. IV. c. 42, s. 3.

(*t*) 56 & 57 Vict. c. 73.

(*r*) 59 Geo. III. c. 12 ; 2 & 3 Will. IV. c. 42.

(*u*) S. 6, sub-s. 1, c. (iii) ; see App. B, p. 377.

## CHAPTER XVII.

### COPYHOLDS.

Title of lord  
of manor.

THE lord of the manor is the freeholder of all the copyhold tenements, and the copyhold tenants hold at the will of the lord according to the custom of the manor (*x*). If no tenant comes in to be admitted (*y*), the lord is entitled to enter and hold possession of the copyhold tenement until the person entitled is admitted, and any succeeding lord may take advantage of an entry made under such circumstances by his predecessor (*z*); but before the lord can seize *quousque* there must have been three proclamations at three successive courts for a tenant to come in and be admitted (*a*), unless a notice to appear and be admitted has been personally served (*a*).

Entry  
*quousque*.

The lord's right to enter for a forfeiture is regulated entirely by the general custom of copyholds or by the special custom of a particular manor.

Forfeitures.  
Absolute  
forfeiture.

Forfeitures are of two classes, the one which operates as an absolute forfeiture of the tenement and destroys the estate *ipso facto*, and the other which operates as a forfeiture only at the election of the lord (*b*). Whether par-

(*x*) *Brown's case*, 4 Co. Rep. 21 a; *Roe v. Wegg*, 6 T. R. 708; *Peachy v. Somerset*, 2 Wh. & Tud. L. C. 1245 (6th ed.).

(*y*) *Salisbury's case*, 1 Lev. 63; *Doe v. Muscott*, 12 M. & W. 832.

(*z*) *Doe v. Trueman*, 1 B. & Ad. 736.

(*a*) *Doe v. Trueman*, 1 B. & Ad. 736; *Doe v. Hellier*, 3 T. R. 162; Scriven, pp. 114—116 (6th ed.).

(*b*) *Doe v. Trueman*, *supra*; *Clarke v. Arden*, 16 C. B. 227;

*Doe v. Bouzfield*, 6 Q. B. 492.

ticular acts or omissions of copyhold tenants operate as absolute forfeitures, or only as forfeitures at the election of the lord depends on the custom, but the general rule is that any act done by a copyholder incompatible with his copyhold interest as established by the custom operates as a forfeiture. Such acts are, making leases without licence of the lord or contrary to the custom of the manor (c); making a feoffment or levying a fine; opening mines; cutting timber, etc.

A forfeiture can only arise by the act or omission of the copyholder or his lessee (d); therefore any act or omission of a devisee, surrenderee (e), or *cestui que trust* (f) before admittance cannot cause a forfeiture (g). A forfeiture does not extend beyond the estate or interest of the person offending. This forfeiture by copyholder for life does not affect a remainderman; nor does forfeiture by a husband holding in right of his wife affect anything but his own interest (h).

How forfeiture incurred.

Extent of.

In the case of an absolute forfeiture the estate is extinguished, and the lord for the time being can enter, while in the case of a forfeiture at the election of the lord, a succeeding lord cannot take advantage of it, unless the lord during whose time it occurred has made his election and has entered (i).

Effect of forfeiture.

Although it is probably not necessary to present a for-

(c) *Jackman v. Hoddesdon*, Cro. Eliz. 351; *East v. Harding*, Cro. Eliz. 498; *Kitchen*, 115.

879; *Rastal v. Turner*, Cro. Eliz. 598.

(d) *Clifton v. Molineux*, 4 Co. Rep. 27 a.

(h) *Saverne v. Smith*, Cro. Car. 7.

(e) *Roe v. Hicks*, 2 Wils. 13.

(i) *Doe v. Trueman*, 1 B. & Ad. 736; *Doe v. Hellier*, 3 T. R. 162; *East v. Harding*, Cro. Eliz. 498.

(f) *Peachy v. Somerset*, 1 Str. 454.

(g) *Baspole v. Long*, Cro. Eliz.

feiture, yet it is safer to present the forfeiture and to prove such presentation (*k*).

Tenant of copyholder in possession.

The lord of the manor can in no case enter on the copyhold tenement either for the purpose of seizing *quousque*, or for a forfeiture, if there be a tenant of the copyholder lawfully in possession under a lease (*l*). By the general custom a copyholder can make leases of the copyhold tenement to continue for one year only (*m*), though by special custom, or the licence of the lord, leases may be made to continue beyond that period (*n*).

Leases by copyholder.

Waiver of forfeiture.

When an act creates a forfeiture or not at the election of the lord, and the lord with knowledge (*o*) does any act afterwards which admits the copyholder to be still a copyholder, such as receiving rent, accepting a surrender, or amercing him in his court, the forfeiture is waived and dispensed with (*p*).

Relief against forfeiture.

Relief against the forfeiture of a copyhold estate was never granted in equity, in absence of any fraud or acquiescence on the part of the lord, unless the forfeiture was for non-payment of a sum of money such as rent or fines (*q*).

Heir at law of copyholds.

The title of an heir at law of copyholds is complete without admittance against everyone except the lord (*r*), and even as against the lord he need not prove admittance

(*k*) Scriven, pp. 187—189 (6th ed.); *East v. Harding*, Cro. Eliz. 498.

(*l*) *Clarke v. Arden*, 16 C. B. 227; *Turner v. Hodges*, Hutton, 101.

(*m*) *Melwich v. Luter*, 4 Co. Rep. 26 a; *Mathews v. Whetton*, Cro. Car. 233.

(*n*) For instances, see Scriven, p. 193 (6th ed.).

(*o*) *Mathews v. Whetton*, Cro. Car. 233.

(*p*) *Doe v. Trueman*, 1 B. & Ad. 736, 745; *Doe v. Hellier*, 3 T. R. 162; *Milfax v. Baker*, 1 Lev. 26.

(*q*) *Peachy v. Somerset*, 2 Wh. & Tud. L. C. 1245 (6th ed.) *Hill v. Barclay*, 18 Ves. 56, 64.

(*r*) *Garland v. Mead*, L. R. 6 Q. B. 441, 449; *Doe v. Clift*, 12 A. & E. 566, 575; *Doe v. Trueman*, 1 B. & Ad. 736, 747; *Doe v. Thompson*, 13 Q. B. 670.



if the lord or his steward has refused to admit him either in or out of court (*s*).

If copyholds are not by the custom descendible to the heir, but the heir has only a customary right of renewal, the heir has no title until admitted by the lord (*t*).

A devise of copyholds has only a right to be admitted, and has no legal title until he has been admitted (*u*). Since the Wills Act (*x*) a surrender to the use of the will is unnecessary (*y*). Devisee of copyholds.

Until the admittance of a devisee the legal estate is in the customary heir (*z*), and if the heir tenders himself to be admitted, the lord cannot seize *quousque* the devisee comes in to be admitted (*a*). If a devisee has not been admitted before his death, the right of admittance descends to the heir of his testator and does not pass to his devisee (*b*).

A surrenderee of copyholds has no legal title before admittance (*c*), but the estate remains in the surrenderor (*c*), and if the surrenderee dies before admittance, the legal estate does not pass to his heir or devisee, but remains in the surrenderor (*d*). An admittance relates back to the time of the surrender, against everyone but the lord, and Surrenderee of copyholds.

(*s*) *Doe v. Bellamy*, 2 M. & S. 87. *Doe v. Lawes*, *supra*; *Doe v. Harrison*, 6 Q. B. 631.

(*t*) *Doe v. Clift*, 12 A. & E. 566, 575; *Doe v. Thompson*, 13 Q. B. 670. (*a*) *Garland v. Mead*, *supra*.

(*u*) *Garland v. Mead*, L. R. 6 Q. B. 441, 449; *Doe v. Lawes*, 7 A. & E. 195; *Roe v. Hicks*, 2 Wils. 13. (*b*) *Doe v. Lawes*, *supra*.

(*x*) 1 Vict. c. 26, s. 3; see App. B, p. 322. (*c*) *Vaughan v. Atkins*, 5 Burr. 2764; *Roe v. Loveless*, 2 B. & Ald. 453; *R. v. Wilson*, 10 B. & C. 80; *R. v. Mildmay*, 5 B. & Ad. 254, 279; *Rayson v. Adcock*, 9 Jur. N. S. 800; *Roe v. Hicks*, 2 Wils. 13.

(*y*) *Garland v. Mead*, *supra*; *Doe v. Ludlam*, 7 Bing. 275. (*d*) *Matthew v. Osborne*, 13 C. B. 919, 941.

(*z*) *Garland v. Mead*, *supra*;

therefore a plaintiff's title will be good if he proves an admittance at any time before the trial (e).

Admittance  
of person  
without title.

The admittance of a person who has no title, upon an unfounded claim, does not pass the estate to him and give him a good title (f).

Lessee need  
not be  
admitted.

A lessee of copyholds need not be admitted (g) and has a good title against all but the lord of the manor, and can recover possession of the demised premises without proving any custom or licence of the lord authorising the lease (h).

Custom of  
descent must  
be proved.

If a plaintiff claims possession as heir by the custom of the manor the custom must be proved (i), but if there is no custom, or so far as there is no custom, the ordinary law of inheritance applies (k).

(e) *Rayson v. Adcock*, 9 Jur. N. S. 800; *Holdfast v. Clapham*, 1 T. R. 600; *Vaughan v. Atkins*, 5 Burr. 2764.

Rep. 26 a; *Doe v. Bousfield*, 6 Q. B. 492; Scriven, 370—372 (6th ed.).

(f) *Zouch v. Forse*, 7 East, 186.

(i) *Roe v. Parker*, 5 T. R. 26; *Denn v. Spray*, 1 T. R. 466.

(g) *Watson v. Waltham*, 2 A. & E. 485, 490.

(k) *Denn v. Spray*, 1 T. R. 466; *Hook v. Hook*, 32 L. J. Ch. 14; *Muggleton v. Barnett*, 27

(h) *Downingham's case*, Owen, 17; *Melwich v. Luter*, 4 Co.

L. J. Ex. 125; Scriven, 270—274 (6th ed.).

## CHAPTER XVIII.

### WHAT PERSONS CAN BE SUED.

A PERSON seeking to recover possession must sue the person who is in possession of the premises either by himself or by his tenants. He may sue the landlord only (a), or only the tenant in actual possession, or both together (a). A mere servant in possession by permission of another is liable to be sued (b).

Person in possession must be sued.  
Possession by tenants or servants.

A landlord is liable to be sued, even if he has given his tenants notice to quit, if they have not given up possession (c).

Landlords.

If possession is vacant, the last person who would have been in possession had the premises not been left vacant should be sued.

Vacant possession.

When judgment for possession has been recovered, the sheriff will turn out all persons in possession, and give possession to the plaintiff (c).

- (a) *Roe v. Wiggs*, 2 B. & P. N. R. 330; *Doe v. Stanton*, 2 B. & Ald. 371. (b) *Doe v. Stradling*, 2 Stark. 187; *Doe v. Roe*, 2 Chit. 179. (c) *Roe v. Wiggs*, *supra*.

## CHAPTER XIX.

### MESNE PROFITS.

MESNE profits as damages for trespass to the land may now be claimed either in the action to recover possession, or by a separate action (a). In an action to recover mesne profits, they can only be recovered down to the date when the action was commenced, except in cases between landlord and tenant under sect. 214 of the Common Law Procedure Act, 1852 (b), when they can be recovered down to the date of the judgment; and under that section they may be recovered though they have not been claimed (c).

What plaintiff must prove.

The plaintiff must prove that he has re-entered into possession, his title during the period for which he claims, that the defendant has been in possession during that period, and the amount of such mesne profits.

Entry into possession.

The plaintiff must have re-entered into possession, either by actual entry or execution of the writ of possession, before he can recover mesne profits (d). When he has once re-entered, the period of his possession relates back to the time when his right of entry accrued, and mesne profits are recoverable for that period (d).

His title.

Before the Common Law Procedure Acts the judgment in ejectment was conclusive evidence of the plaintiff's title

- (a) Ord. III. r. 6; Ord. XVIII. 135; *Smith v. Tett*, 9 Exch. 307.  
r. 2. (d) *Barnett v. Guildford*, 11  
(b) 15 & 16 Vict. c. 76, s. 214; Exch. 19; *Wilkinson v. Kirby*,  
App. B, p. 346. 15 C. B. 430; *Litchfield v. Ready*,  
(c) *Doe v. Hodgson*, 12 A. & E. 5 Exch. 939.

from the date at which the title was by the writ alleged to have accrued. Under the Common Law Procedure Acts it was only conclusive evidence of title at the date of the writ, and such would seem now to be the case, the form of judgment under the Judicature Acts being the same as under the Common Law Procedure Acts (*e*). It is only conclusive as an estoppel, if so pleaded (*f*); but if there is no opportunity of so pleading it, it is conclusive as evidence (*f*). It is conclusive whether given after trial or upon default (*g*), and against all persons claiming under the defendant, but not against strangers (*h*). If mesne profits are claimed for a time anterior to the judgment, evidence must be given to prove the plaintiff's title during such time.

Mesne profits being thus damages for trespass, and it being necessary for him to prove his possession, it is difficult to see how a claim for them can ever be joined with an action to recover possession (except under the Common Law Procedure Act, 1852) (*i*), for until the plaintiff has actually recovered possession he has no cause of action for mesne profits. In practice, however, no such objection as this seems ever to be taken.

The judgment in ejectment probably proves the possession of the defendant from the date of the writ in the action of ejectment (*k*). If, however, the defendant is

The possession of the defendant.

(*e*) *Harris v. Mulhern*, 1 Ex. D. 31; *Pearse v. Coaker*, L. R. 4 Ex. 92; *Aslin v. Parkin*, 2 Burr. 665; *Wilkinson v. Kirby*, 15 C. B. 430.

(*f*) *Doe v. Wright*, 10 A. & E. 763; *Doe v. Huddart*, 2 C. M. & R. 316; *Matthew v. Osborne*, 13 C. B. 919; *Vooght v. Winch*, 2 B. & Ald. 662; 2 Smith's L. C. 853 (ed. 9).

(*g*) *Barnett v. Guildford*, 11

Exch. 19; *Aslin v. Parkin*, 2 Burr. 665.

(*h*) *Denn v. White*, 7 T. R. 112; *Doe v. Whitcomb*, 8 Bing. 46; *Doe v. Harvey*, 8 Bing. 239; *Hunter v. Britts*, 3 Camp. 455.

(*i*) S. 214; App. B, p. 346.

(*k*) *Pearse v. Coaker*, L. R. 4 Ex. 92; *Aslin v. Parkin*, 2 Burr. 665; *Doe v. Challis*, 17 Q. B. 166; *Dodwell v. Gibbs*, 2 C. & P. 615.

alleged to have been in possession before that time, the duration of his possession must always be proved (*l*).

Mesne profits may be recovered from any person who has been in actual possession even if only as servant, and from persons who have been in possession by their subtenants or servants (*m*).

The amount  
of mesne  
profits.

The amount that may be recovered as mesne profits is not limited to the rental value of the land, but the jury may give extra damages, as for deterioration (*n*) and the reasonable costs of getting into possession (*o*). The mesne profits are to be assessed for the period during which the defendant was in possession and the plaintiff was entitled (*p*). And the defendant ought to be allowed a deduction for any outgoings and ground rent which he may have paid (*q*).

(*l*) *Ive v. Scott*, 9 Dowl. 993.

(*m*) *Henderson v. Squire*, L. R.

4 Q. B. 170; *Doe v. Harlow*, 12 A. & E. 40; *Ibbs v. Richardson*, 9 A. & E. 849; *Burne v. Richardson*, 4 Taunt. 720; *Doe v. Whitcomb*, 8 Bing. 46; *Holcomb v. Rawlins*, Cro. Eliz. 540; *Doe v. Challis*, 17 Q. B. 166.

(*n*) *Goodtitle v. Tombs*, 3 Wils. 118; *Doe v. Roe*, 6 C. B. 272,

275; *Dunn v. Large*, 3 Doug. 335.

(*o*) *Doe v. Filliter*, 13 M. & W. 47, 48; *Pearse v. Coaker*, L. R. 4 Ex. 92.

(*p*) *Stanynought v. Cosins*, Barnes, 456.

(*q*) *Doe v. Hare*, 2 Cr. & M. 145; *Barber v. Brown*, 1 C. B. N. S. 121.

## CHAPTER XX.

### STATUTES OF LIMITATION.

THE time within which proceedings must be taken to recover possession of land is now regulated by the Real Property Limitation Act, 1833 (*a*), as amended by the Act of 1837 (*b*), and the Real Property Limitation Act, 1874 (*c*). By the Act of 1874, sects. 2, 5, 16, 17, 23, 28 and 40 of the Act of 1833 are repealed, and sect. 18 is amended, and the Act of 1837 is also amended (*d*). By the Statute Law Revision Act, 1874 (*e*), sects. 37, 38 and 45 of the Act of 1833 were wholly repealed, and sects. 36 and 44 were repealed in part. By the Civil Procedure Acts Repeal Act, 1879 (*f*), sect. 36 of the Act of 1833 was repealed. The provisions of the Acts of 1833, 1837, and 1874, so far as they are not repealed, are set out in the Appendix (*g*).

Statutes of Limitation ought not to be construed strictly, but beneficially with a view to the mischief intended to be remedied. "The legitimate object," says Dallas, C.J., "of all statutes of limitation is no doubt to quiet long-continued possession, but they all rest upon the broad and intelligible principle that persons who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their

Construction  
of the Acts.

(*a*) 3 & 4 Will. IV. c. 27.

(*b*) 7 Will. IV. & 1 Vict. c.

28.

(*c*) 37 & 38 Vict. c. 57.

W.Y.E.

(*d*) *Id.* s. 9.

(*e*) 37 & 38 Vict. c. 35.

(*f*) 42 & 43 Vict. c. 59.

(*g*) App. B, p. 305, 331, 372.

part to assert their rights, slept upon them for so long a time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties, and as the effect of 3 & 4 Will. 4, c. 27, which is now relied on by the plaintiff, is to divest the estate of the rightful owner, and convey it to a wrongdoer without compensation to the former, to hold that such a transfer takes place in cases where the rightful owner has been guilty of no neglect or default, would work such an injustice to him as to induce us to resort to any reasonable construction of the statute which should avoid so unjust a result" (*h*).

Doctrine of  
adverse  
possession  
abolished.

The doctrine of adverse possession is now done away with, and an action or suit to recover the land or rent must now, as a general rule, be brought within twelve years after the right of entry of the plaintiff (or of the person under whom he claims) first accrued, whatever be the nature of the defendant's possession (*i*). The statutes do not apply to cases of want of actual possession by the plaintiff, but to those cases where he has been out of, and another has been in, possession for the prescribed time; there must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected (*k*); and, as against the claimant, there must have been possession under circumstances which evince its incompatibility with a freehold in him (*l*).

What  
possession  
necessary.

(*h*) *Tolson v. Kaye*, 3 B. & B. 217, 222; *Adnam v. Sandwich*, 2 Q. B. D. 485, 489.

(*i*) *Nepean v. Doe*, 2 Smith, L. C. 610 (ed. 9); *Holmes v. Newlands*, 11 A. & E. 44; *Culley v. Doe*, 11 A. & E. 1008, 1015; *Magdalen Hospital v. Knotts*, 8

Ch. D. 709, 729.

(*k*) *Smith v. Lloyd*, 9 Exch. 562; *Rimington v. Cannon*, 12 C. B. 18; *McDonnell v. McKinty*, 10 Ir. L. R. 514; *Trustees Co. v. Short*, 13 App. Cas. 793; *Dartmouth v. Spittle*, 24 L. T. 67.

(*l*) *Des Barres v. Shey*, 29



A person may retain possession, sufficient to prevent the operation of the statute, by an agent or by a tenant. The possession of an agent is that of his principal, and a principal may acquire a possessory title by receiving rents for twelve years through an agent, though the agent is really the person entitled to the estate (*m*). Possession by agent, &c.

The fact that a person receives the rents of a property raises a *prima facie* presumption that he is the owner (*n*) ; this presumption may, however, be rebutted by evidence showing that he was in fact acting as agent (*o*) ; as, for instance, by the way in which he dealt with the rents, or by his own statements as to his position (*p*). A person who receives rents as agent is presumed to continue to receive them in the same capacity until the contrary is shown (*q*). The possession of a solicitor who holds the mortgaged estate after paying off his client's debt, is the possession of his client against whom the statute does not run (*r*). The possession of an agent, who receives the rents of an estate after the death of his principal intestate, is the possession of the heir (*s*). Possession as agent, &c.

The possession of a tenant is the possession of his landlord, both of the land demised and generally of any encroachments made by the tenant (*t*), unless the tenant clearly intended to encroach for his own benefit (*t*) ; the Possession by tenant,  
encroachments ;

L. T. 592 ; *Phillipson v. Gibbon*, 6 Ch. 428 ; *Searby v. Tottenham Ry.*, 5 Eq. 409 (commented on in *Norton v. L. & N. W. Ry.*, 13 Ch. D. 268, 271, note) ; *Leigh v. Jack*, 5 Ex. D. 264.

(*m*) *Williams v. Pott*, 12 Eq. 149 ; *Smith v. Bennett*, 30 L. T. 100.

(*n*) *Pelley v. Bascombe*, 33 L. J. Ch. 100 ; *Thomas v. Thomas*, 2 K. & J. 79.

(*o*) *Lyell v. Kennedy*, 14 App.

Cas. 437 ; and cases in note (*n*).

(*p*) *Lyell v. Kennedy*, *supra* ; *Pelley v. Bascombe*, *supra*.

(*q*) *Smith v. Bennett*, 30 L. T. 100 ; *Hobbs v. Wade*, 36 Ch. D. 553, 557.

(*r*) *Ward v. Carrtar*, 1 Eq. 29 ; *Doe v. Rees*, 6 C. & P. 610 ; *Doe v. Massey*, 17 Q. B. 373.

(*s*) *Lyell v. Kennedy*, 14 App. Cas. 437.

(*t*) *Smith v. Stocks*, 20 L. T.

by receiver ; possession of a receiver is *primâ facie* the possession of  
by guardian. the person appointing him (*u*). The possession of a  
guardian is the possession of the infant of whom he is  
guardian (*x*), and the statute does not begin to run against  
the infant, and in favour of the guardian, until something  
has been done to change the character of that possession ;  
and such a change will not be inferred from the mere re-  
tention of the property by the guardian after the infant  
has attained his majority (*y*).

Possession of  
the surface.

The possession of the surface is *primâ facie* possession  
of the minerals beneath, unless they are dissevered in  
title (*z*) ; but where they are dissevered in title from the  
surface, no presumption of a possession of the whole arises  
from possession of a part (*a*).

Action to be  
commenced  
within 12  
years.

In order to prevent the operation of the Statutes of  
Limitation, the action, speaking generally, must be brought  
within twelve years of the time when the cause of action  
first accrued (*b*), and this is, in most cases, though not in  
all, explained by sect. 3 (*c*) and certain other sections of the  
Act of 1833 (*c*), and sect. 2 of the Act of 1874 (*d*). This  
limit of twelve years is qualified by other sections of the  
same Acts, *e.g.*, where there has been an acknowledgment

740 ; *Whitmore v. Humphries*,  
L. R. 7 C. P. 1 ; *A.-G. v. Tom-  
line*, 5 Ch. D. 750 ; 15 Ch. D.  
150 ; s. 8 of 3 & 4 Will. IV. c.  
27, see App. B, p. 308 ; see *Doe*  
*v. Mulliner*, 1 Esp. 460.

(*u*) *Penney v. Todd*, 26 W. R.  
502.

(*x*) *Dormer v. Fortescue*, 3 Atk.  
123, 130 ; *Crowther v. Crowther*,  
23 Beav. 305, 309.

(*y*) *Tinker v. Rodwell*, 69 L. T.  
591 ; *Pelly v. Bascombe*, 4 Giff.  
390 ; *Hobbs v. Wade*, 36 Ch. D.

553 ; *Thomas v. Thomas*, 2 K. &  
J. 79 ; *Young v. Harris*, 65 L. T.  
45.

(*z*) *Keyse v. Powell*, 2 E. & B.  
132 ; *Smith v. Lloyd*, 9 Exch.  
562 ; *Seddon v. Smith*, 36 L. T.  
168.

(*a*) *Dartmouth v. Spittle*, 24  
L. T. 67.

(*b*) S. 1, 37 & 38 Vict. c.  
57.

(*c*) 3 & 4 Will. IV. c. 27.

(*d*) 37 & 38 Vict. c. 57.

of title (e), or a payment of rent (f), or any disability existing at the time when the right first accrued (g).

A suit by the heir of a former tenant to compel the lord who had seized copyholds *quousque* to admit him is within sect. 1 of the Act of 1874 (h). So is a widow's right to sue out a writ of dower (i). Suit to compel admittance to copyholds.  
Dower.

Sect. 3 of the Act of 1833 (k) may be divided into five distinct heads, which explain, and give the time at which, the right first accrues in those cases in which doubt or difficulty might occur, leaving every case which plainly falls within the general words of sect. 1 of the Act of 1874 (l), but is not included amongst the instances given by sect. 3 of the Act of 1833, to be governed by the operation of sect. 1 of the Act of 1874 (m). The word rent in this section probably means a rentcharge (n). Operation of s. 3 of Act of 1833.  
"Rent."

These five heads are : (1) where the claimant, or person through whom he claims, has been in possession and has been dispossessed or has discontinued possession; (2) where the claim is to the land of a deceased person who was in possession until his death, and was the last person entitled who was in possession; (3) where the claim is under an instrument (other than a will) made by a person in possession, and no person entitled under the instrument has been in possession; (4) where the claim is to a future estate and no person has been in possession in respect of such estate; The five heads of s. 3.

(e) S. 14 of 3 & 4 Will. 4, c. 27.

(f) S. 35, *id.*

(g) Ss. 3, 4, 5 of 37 & 38 Vict. c. 57.

(h) *Walters v. Webb*, 5 Ch. 531.

(i) *Marshall v. Smith*, 34 L. J. Ch. 189.

(k) 3 & 4 Will. 4, c. 27; see App. B, p. 306.

(l) 37 & 38 Vict. c. 57, s. 1; see App. B, p. 352.

(m) *James v. Salter*, 3 B. N. C. 544; *Magdalen Hospital v. Knotts*, 8 Ch. D. 709, 727; *Pugh v. Heath*, 7 App. Cas. 235; *Owen v. De Beauvoir*, 16 M. & W. 547.

(n) *Doe v. Angell*, 9 Q. B. 328, 355.

(5) where the claim is founded upon a forfeiture or breach of condition.

Dispossession.

Discontinu-  
ance of  
possession.

Under the first head, where the claimant or person through whom he claims has been dispossessed or has discontinued possession, the cause of action accrues upon such dispossession or discontinuance. "Dispossession" takes place where one person comes in and drives out another from possession. "Discontinuance" of possession is where the person who has a right to possess goes out and is followed into possession by another; this does not occur where a person has conveyed his estate to another (o). This part of the section does not apply where a lessor permits his lessee during the continuance of the lease to pay no rent; such a case falls rather within the fourth head (p). Though a person dispossessed of land is allowed twelve years from the time of his being dispossessed, a person disseised of rent has twelve years only from the last payment of rent within which to bring his action (q).

Abandonment  
by intruder  
without  
acquiring  
a statutory  
title.

Where a person who has taken possession without title, abandons possession without having acquired a statutory title, the rightful owner is in the same position on the abandonment as he was before the intrusion (r).

Claim to land  
of deceased  
person.

Under the second head of the section, if a person claim the land or rent of a deceased person who remained in possession of the land, or receipt of the rent (s) until his death, and was the last person entitled who was in such possession or receipt, the right to enter is deemed to have

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|--|---|
| <p>(o) <i>Rimington v. Cannon</i>, 12 C. B. 18, 34; <i>Abergavenny v. Brace</i>, L. R. 7 Ex. 145; <i>Adnam v. Sandwich</i>, 2 Q. B. D. 485, 490; <i>Leigh v. Jack</i>, 5 Ex. D. 264, 272; <i>Rains v. Buxton</i>, 14 Ch. D. 537.</p> | <p>113; <i>Chadwick v. Broadwood</i>, 3 Beav. 308; see <i>post</i>, p. 200—202.<br/>(q) <i>Owen v. De Beauvoir</i>, 16 M. &amp; W. 547, 565.<br/>(r) <i>Trustees Co. v. Short</i>, 13 App. Cas. 793.<br/>(s) <i>Baines v. Lumley</i>, 16 W. R. 674.</p> |
| <p>(p) <i>Doe v. Ozenham</i>, 7 M. &amp; W. 131; <i>Grant v. Ellis</i>, 9 M. &amp; W.</p>  |   |

accrued at the death (*t*). Under this part are treated the cases of heir at law and devisee. The result of this is that if the ancestor or testator died in possession, the heir or devisee, as the case may be, has twelve years from the death during which he may assert his claim to the estate (*x*). If, however, the ancestor or testator died out of possession, and the time had begun to run against him, then the heir or devisee has only as long a time within which to make his claim as the ancestor or testator would have had under the first part of the section (*y*).

Heir and  
devisee.

A person in possession without other title, even for less than the statutory period, has a devisable interest; if he devise this interest, his devisee's title is under the will, and he or his heirs can eject any one who has not a title prior to the testator (*z*). If a devisee enter under such circumstances, and rely on the will, he cannot plead the Statute of Limitations against, or dispute the title of, a remainderman under the same will (*a*). Where a devisee for life took possession of land to which she wrongly believed she was entitled under the will of a testator who died before the Wills Act, the land having been acquired after the date of the will, it was held that after the lapse of the statutory period she acquired a title against a person claiming as remainderman under the will and against the heir at law (*b*).

Devisable  
interest.

Possession  
under a will.

(*t*) S. 3 of 3 & 4 Will. 4, c. 27; *Doe v. Long*, 9 C. & P. 773; *Doe v. Bramston*, 3 A. & E. 63; *James v. Saller*, 3 B. N. C. 544.

(*x*) S. 3 of 3 & 4 Will. 4, c. 27; *Doe v. Long*, *supra*.

(*y*) S. 3 of 3 & 4 Will. 4, c. 27; *Doe v. Bramston*, *supra*; see *Jumpsen v. Pitchers*, 13 Sim. 327.

(*z*) *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Keeffe v. Kirby*, 6 Ir. C.

L. R. 591; *Clarke v. Clarke*, Ir. Rep. 2 C. L. 395; *Hawksbee v. Hawksbee*, 11 Hare, 230; *Re Stringer*, 6 Ch. D. 1, 10; *Kernaghan v. M'Nally*, 12 Ir. Ch. Rep. 89.

(*a*) *Board v. Board*, L. R. 9 Q. B. 48; *Paine v. Jones*, 18 Eq. 320.

(*b*) *Paine v. Jones*, *supra*.

Administra-  
tor.

With regard to an administrator the rule of law formerly was that, as to all rights occurring after the death of the intestate, time only began to run from the grant of administration. Now by sect. 6 of the Act of 1833, time begins to run from the death of the intestate, and an administrator must claim as if no interval had occurred between the death of the intestate, and the grant of administration (c). Where letters of administration have been granted the administrator is entitled to all the rights which the intestate had, at the time of his death, vested in him, although no right of action accrues to the administrator until he has obtained letters of administration (d).

Executor.

The case of an executor falls within the principles governing the case of devisee (e).

Claims under  
instruments  
other than  
wills.

The third head of sect. 3 applies to claims to lands or rents under any instrument other than a will, when no person entitled under such instrument has been in possession. It deals with the cases where wrongful possession commenced immediately on alienation by the rightful owner (f). In such case the cause of action accrues when the claimant became entitled by virtue of the instrument (g). This part applies to cases where the person holding the land does not hold it under, or in privity with the person in whom the right of entry is supposed to be, and therefore does not apply to the case of a *cestui que trust* holding possession of a land under a trustee (g).

Estates  
in remainder  
and reversion.

The fourth head of this section, which relates to estates in remainder or reversion expectant on the determination

(c) S. 6 of 3 & 4 Will. 4, c. 27; *Re Williams*, 34 Ch. D. 558; see *Re Bonsor and Smith*, 34 Ch. D. 560, note.

(d) *Pratt v. Swaine*, 8 B. & C. 285; see p. 162.

(e) *Ante*, p. 199.

(f) S. 3 of 3 & 4 Will. 4, c. 27; *James v. Salter*, 3 B. N. C. 544.

(g) *Garrard v. Tuck*, 8 C. B. 231, 252. See *post*, p. 216.

of a particular estate, must be construed with reference to sect. 2 of the Act of 1874 (*h*). Under these two sections a person entitled to an estate or interest in reversion, or remainder, or other future estate, has twelve years from the time at which his estate has become an estate or interest in possession during which he can make an entry or distress or bring an action or suit to recover it (*i*), even though he himself or someone through whom he claims has been previously in possession or in receipt of the rents (*h*). This section only applies to cases where a person other than the remainderman or reversioner is entitled to the particular estate, for if the same person has concurrent rights to both estates sect. 20 applies (*k*).

Another person must have particular estate.

It is further provided by sect. 2 of the Act of 1874 that if the person last entitled to the particular estate was not in possession, or in receipt of the rents, when his interest determined, then the owner of the future estate has twelve years from the time when the right to make an entry or distress or bring an action first accrued to the person last entitled to the particular estate, or six years from the time when his own estate became vested in possession, whichever period is the longer (*l*). This applies to the case in which the person entitled is out of possession, *i.e.*, where the right to possession and the actual possession are separated; in such cases a cause of action accrues to the owner of the particular estate, and on its cesser another cause of action accrues to the owner of the remainder, and the two periods mentioned in the enactment run respectively from

When owner of particular estate out of possession.

(*h*) 37 & 38 Vict. c. 57, s. 2; App. B, p. 353. S. 5 of 3 & 4 Will. 4, c. 27, is repealed.

(*i*) *Ecclesiastical Commissioners v. Rowe*, 5 App. Cas. 736; *Corpus College v. Rogers*, 49 L. J. Ex. 4; see *Ecclesiastical Commissioners v.*

*Tremer*, [1893] 1 Ch. 166.

(*k*) *Post*, p. 211; *Doe v. Mouldale*, 16 M. & W. 689.

(*l*) 37 & 38 Vict. c. 57, s. 2; 3 & 4 Will. 4, c. 27, s. 5, is now repealed.

Effect of  
future estate  
being barred.

the accruing of these rights of action (*m*). If the owner of the future estate is barred, the bar extends to any person who claims in respect of any subsequent estate under any deed, will, or instrument executed or taking effect after the original dispossession commenced (*n*).

Conveyances  
by tenant for  
life.

If the tenant for life conveys in fee to a purchaser, the remainderman or his assigns may recover the land within twelve years from the death of the tenant for life (*o*).

Landlord.

A landlord, being a reversioner, is within the provisions of this section (*p*), subject to certain qualifications contained in sects. 7, 8, and 9 of the Act of 1833 (*q*). Under the old law a landlord might re-enter at the expiration of his lease, or within twenty years from that time, even though he had during the lease discontinued the receipt of rent from his tenant (*r*). Now if he has discontinued receipt of the rent he has twelve years from such discontinuance, or, if he has received rent up to the termination of the lease, then twelve years from such termination, except in cases of leases in writing under sect. 9, when the right accrues in one case from the time when some person wrongfully receives the rent, and in the other cases not until the determination of the lease.

Forfeiture on  
breach of  
condition.

The fifth head of sect. 3 (*s*), and also sect. 4 (*s*), apply to ejectments founded upon any forfeiture or breach of condition. This part of sect. 3 fixes the occurrence of the forfeiture, or breach of condition, as the time at which the right to enter first accrues; and sect. 4 provides that, if the right to enter first accrues in respect of an estate or interest in reversion, or remainder, and no advantage has

(*m*) *Pedder v. Hunt*, 18 Q. B. 27.  
D. 565.

(*n*) 37 & 38 Vict. c. 57, s. 2;  
App. B, p. 353.

(*o*) *Doe v. Hull*, 2 D. & R. 38.

(*p*) S. 3 of 3 & 4 Will. 4, c.

(*q*) *Post*, p. 204—207.

(*r*) *Elvis v. York*, Hob. 322.

(*s*) 3 & 4 Will. 4, c. 27; App.  
B, p. 306.



been taken of the forfeiture by the remainderman or reversioner, his right shall be deemed to have first accrued in respect of such estate or interest when that estate becomes an estate in possession, as if no such forfeiture or breach of condition had happened (s). The words "forfeiture" and "breach of condition" are used in their largest sense, and include every case of forfeiture or breach of condition, whether the effect of the forfeiture was to accelerate another estate under what is sometimes called a conditional limitation, or whether the effect of the forfeiture was merely to give a right to the heir to re-enter under the old common law rule (t).

The object of sect. 4 is to prevent a person, who either intentionally or otherwise fails to take advantage of a forfeiture, from being barred of his rights altogether, while sect. 3 fixes the time from which the statute runs when it is proposed to take advantage of the forfeiture (u). A remainderman or reversioner need not insist on the forfeiture of the particular estate, but may wait its regular expiration, in which case the statute does not begin to run until the expiration (w).

If a person makes a void or voidable lease, he has an immediate right of entry, and time begins to run from the moment of the execution of the lease (x). If, however, rent has been reserved and received, a yearly tenancy will be inferred and will prevent the statute from running (x).

Void or voidable lease.

Sect. 7 (y) deals with the case of a tenancy at will, and

Tenancy at will.

(t) *Asley v. Essex*, 18 Eq. 290; see *Magdalen Hospital v. Knotts*, 8 Ch. D. 709, 727.

(u) 2 Smith's L. C. p. 747 (ed. 9).

(w) *Doe v. Blakeway*, 5 C. & P. 563; see *Malloon v. Fitzgerald*, 3 Mod. 29.

(x) *Magdalen Hospital v. Knotts*, 4 App. Cas. 324; see *Webster v. Southey*, 36 Ch. D. 9.

(y) S. 7 of 3 & 4 Will. 4, c. 27; App. B, p. 307; *Doe v. Thompson*, 6 A. & E. 721; *Doe v. Moore*, 9 Q. B. 555; *Day v. Day*, L. R. 3 P. C. 751, 760.

enacts that such a tenancy, if not determined sooner, is to be deemed to be determined at the expiration of a year from its commencement. A landlord must therefore bring his action within twelve years from the actual determination of the tenancy at will, or within thirteen years from its commencement (z). If, before the right to recover possession from a tenant at will is gone, the tenancy is put an end to, and a new tenancy at will is created between the parties by a fresh agreement, express or implied, then the statute begins to run from one year after the creation of such new tenancy (a). It appears, however, to be doubtful whether, when a tenancy at will has been determined and succeeded by a tenancy on sufferance, the statute runs from one year after the commencement of the tenancy at will or from the commencement of the tenancy on sufferance (b). The better opinion seems to be that expressed in *Doe v. Page* and *Randall v. Stevens*, that when the tenancy at will has been so determined, the statute runs from the time of such determination, whether the subsequent holding is at will or on sufferance (c), and it is a question for the jury whether the old tenancy at will has been so determined and followed by a new tenancy at will or on sufferance (d). This section (e) applies to tenancies at will, even where the landlord had no power of letting or selling except with the consent of the vestry, so as to

(z) See note (y), preceding page.

(a) *Doe v. Turner*, 7 M. & W. 226; *Hodgson v. Hooper*, 3 E. & E. 149, 172; *Locke v. Mathews*, 13 C. B. N. S. 753.

(b) *Doe v. Turner*, *supra*; *Doe v. Page*, 5 Q. B. 767; *Doe v. Angell*, 9 Q. B. 328; *Doe v. Moore*, 9 Q. B. 555; *Doe v. Carter*, 9 Q. B. 863; *Day v. Day*, L. R.

3 P. C. 751; *Randall v. Stevens*, 2 E. & B. 641; 2 Smith, L. C. 760 (ed. 9).

(c) *Nepean v. Doe*, 2 Smith, L. C. 610, 760 (ed. 9).

(d) *Doe v. Turner*, *supra*; *Hogan v. Hand*, 14 Moore P. C., 311; *Day v. Day*, *supra*.

(e) S. 7 of 3 & 4 Will. 4, c. 27.

*See Review 39 Lj. 312*

bar the claim of the landlord (*f*). It also applies to the case of a mortgagor who has paid the mortgage debt, but has not obtained a reconveyance, as he, if in possession, is tenant at will to the mortgagee (*g*). Mortgagor who has redeemed without reconveyance.

It has been laid down that the concluding proviso, to the effect that no *cestui que trust* shall be deemed to be tenant at will to his trustee within the meaning of this clause (*h*), applies only to express trusts, not to cases where a trust is implied by any rule of law or equity (*i*); but that decision cannot now be considered correct (*k*). Trustee and *cestui que trust*.

The case of a tenancy from year to year or other period, without any lease in writing, is dealt with by sect. 8 of the Act of 1833 (*l*); in this case the landlord's right to enter accrues at the end of the first year or other period, or from the last receipt of rent (*m*), whichever last happens, and he has twelve years from that time in which to assert his claim (*n*). The operation of the section is, however, excluded if there be a lease in writing (*n*), though what amounts to a lease in writing is a question which must be determined upon the facts of each particular case (*o*). The section applies to tenancies created before, and existing at, the time of the passing of the Act (*p*), as well as to tenancies since created. It defines with precision the date when the right of action is deemed to have accrued, Tenancy from year to year.

(*f*) *Brighton v. Brighton*, 5 Q. B. 648.  
C. P. D. 368.

(*g*) *Sands to Thompson*, 22 Ch. D. 614.

(*h*) S. 7, 3 & 4 Will. 4, c. 27.

(*i*) *Doe v. Rock*, 4 M. & Gr. 30.

(*k*) *Drummond v. Sant*, L. R. 6 Q. B. 763; *Garrard v. Tuck*, 8

C. B. 231; *Nepean v. Doe*, 2 Smith, L. C. 610, 781 (ed. 9);

*Warren v. Murray*, (1894) 2

Q. B. 648.

(*l*) 3 & 4 Will. 4, c. 27.

(*m*) See, as to payment of rent, p. 227, 228, and *Doe v. Beckett*, 4 Q. B. 601.

(*n*) S. 8.

(*o*) *Doe v. Gower*, 17 Q. B. 589.

(*p*) *Doe v. Sumner*, 14 M. & W. 39; s. 8.

"Rent."

*i.e.*, the end of the first year, or other period of the tenancy, so that the doctrine that the possession of the tenant is the possession of the person entitled, does not apply to prevent the statute running from that time (*q*). The word "rent" in the section has two meanings, in the former part it means rentcharge (*r*), while in the latter part it means rent reserved, which is not necessarily money (*s*); but whatever its meaning, the payment of the rent or performance of the rent service must have been made as and for rent, and not either expressly or impliedly on account of something else (*t*).

Leases in writing.

Sect. 9 of the Act of 1833 provides that where a person holds land under a lease in writing, at a rent of not less than twenty shillings a year, and such rent has been received by a person wrongfully claiming to be entitled thereto, and no payment has subsequently been made to the person rightfully entitled, the right of entry of the true owner accrues at the time of the first receipt of the rent by the wrongful claimant, and he has twelve years from that time within which to assert his rights (*u*). This was a perfectly new enactment. Under the old law receipt of rent by another never constituted an ouster (*x*).

Receipt of rent by wrongful claimant.

Under this section the landlord's right is not barred by mere non-payment of rent by his tenant. There must be a receipt of the rent by a wrongful claimant (*u*). The

(*q*) *Lyell v. Kennedy*, 18 Q. B. D. 796, 813; *Bushby v. Dixon*, 3 B. & C. 298.

(*r*) *Baines v. Lumley*, 16 W. R. 674; *Doe v. Angell*, 9 Q. B. 328.

(*s*) *Baines v. Lumley*, *supra*; s. 1; App. B, p. 305.

(*t*) *A.-G. v. Stephens*, 6 De G.

M. & G. 111, 146; *Doe v. Hinde*, 2 M. & Rob. 441.

(*u*) *Archbold v. Scully*, 9 H. L. C. 360; *Doe v. Angell*, 8 Q. B. 328, 355; *Chadwick v. Broadwood*, 3 Beav. 308, 316.

(*x*) *Nepean v. Doe*, 2 Smith, L. C. 610, 767 (ed. 9).

receipt of rent by the wrongful claimant must be actual and not constructive (*y*). If no rent (*z*), or a rent of less than twenty shillings a year, is reserved, or there is no receipt by a wrongful claimant (*a*), this section does not apply. These latter cases are within sect. 3 of the Act of 1833, and the landlord's right of entry accrues at the termination of the lease (*a*).

The words "wrongfully claiming to be entitled" do not exclude a receipt by mistake; these words mean that a person not entitled has made a claim to, and received, the rents as against the person who is entitled (*b*). "Wrongfully claiming."

It seems, therefore, that in the two cases of a tenant at will (*c*), and of a tenant under a lease not in writing (*d*), the tenant, by mere non-payment of rent, can obtain a right to the land as against his landlord. In the case, however, of a tenant under a lease in writing this can never happen, as mere non-payment is not sufficient, but there must be a payment to a wrongful claimant. Distinction between ss. 7 and 8, and s. 9.

It is provided by sect. 10 of the Act of 1833 that no person shall be deemed to have been in possession of land merely by reason of his having made an entry thereon (*e*). This section applies only to mere entries *pro forma*, where no actual possession is taken and the true owner's rights are not asserted, and the possession of the tortious possessor is not removed (*f*). Mere entry does not give possession.

No continual or other claim upon or near any land Continual claim.

(*y*) *Twiss v. Noblett*, 4 Ir. Rep. Eq. 64.

Rep. Eq. 574.

(*z*) *Ex parte Jones*, 4 Y. & C. 466.

(*c*) S. 7, 3 & 4 Will. 4, c. 27.

(*d*) S. 8, *id*.

(*a*) *Doe v. Ozenham*, 7 M. & W. 131; *Doe v. Gopsall*, 4 Q. B. 603, note b; see p. 197, *ante*.

(*e*) S. 10, 3 & 4 Will. 4, c. 27.

(*b*) *Williams v. Pott*, 12 Eq. 149; *Shaw v. Keighron*, 3 Ir.

(*f*) *Randall v. Stevens*, 2 E. & B. 641; *Worssam v. Vandenberghe*, 17 W. R. 53; *Doe v. Coombes*, 9 C. B. 714; *Locke v. Mathews*, 13 C. B. N. S. 753.

can now preserve any right of making an entry or distress or of bringing an action (*g*).

Coparceners,  
joint tenants  
and tenants  
in common.

The possession of land or rent by one coparcener, joint tenant, or tenant in common, is not, as formerly (*h*), the possession of any of the others, and the entry by one does not preserve any right in any of the others (*gg*). If therefore one coparcener, joint tenant, or tenant in common, has been in possession for the benefit of himself, or of a stranger, of the entirety of the whole of the lands, or of the entirety of any portion, for the statutory period, he acquires a title to the exclusion of all the others (*i*), and no subsequent payment of rent or acknowledgment can restore the extinguished title (*k*). The disability of one does not preserve the right of entry to the others (*l*).

If two or more persons have been in possession of lands without other title for the statutory period they acquire an interest as joint tenants, unless they have done anything to sever their tenancy (*m*).

This section applies to all coparceners, joint tenants and tenants in common from the time when they first became such, and not merely from the time when the Act came into operation (*n*).

Entry by  
younger  
brother.

When a younger brother or other relation of the heir enters into possession of the land or receipt of the rent, such possession or receipt is no longer deemed to be the

(*g*) S. 11, 3 & 4 Will. 4, c. 27; 91; see *Hobbs v. Wade*, 36 Ch. D. 553.  
*Ford v. Grey*, 1 Salk. 285.

(*gg*) S. 12.

(*h*) *Ford v. Grey*, 1 Salk. 285; D. 373.

Co. Litt. 243 b, 373 b. (*l*) *Roe v. Rowleston* 2 Taunt. 441.

(*i*) *Burroughs v. McCreight*, 1 J. & L. 290; *Woodroffe v. Doe*, 15 M. & W. 769, 792; *Murphy*

*v. Murphy*, 15 Ir. C. L. R. 205; 1008, 1017; *Doe v. Horrocks*, 1 *Tidball v. James*, 29 L. J. Ex. C. & K. 566.

(*m*) *Ward v. Ward*, 6 Ch. 789.

(*n*) *Culley v. Doe*, 11 A. & E.

possession or receipt of the heir (o). Under the old law the entry by a younger brother generally, on the death of the ancestor, was the entry of his elder brother (p).

Where an acknowledgment in writing of title has been made by the person in possession or in receipt of rent to the person entitled, or his agent, that is equivalent to possession or receipt by the person entitled or his agent, and the right of entry accrues from that acknowledgment, or the last of such acknowledgments if more than one (q), and the statute begins to run from that moment (r). An acknowledgment of title must be in writing (s), signed by the person then in possession, or in receipt of the profits of the land or rent; signature by the agent of the person in possession is probably not sufficient (t); it must be given to the person entitled or his agent, and not to a third person (u). The acknowledgment must be given before the statutory period has expired, otherwise it is too late (x).

Acknowledgment.

Essentials of acknowledgment.

*this word should be omitted (see Binn 39 & p. 312)*

There is a distinction between the acknowledgment required under this section and that required under sect. 28; here it must be given to the party entitled or his agent, signed by the person in possession, while under sect. 28 it must be given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, and must be signed by the mortgagee or the person claiming through him (y).

Distinction between s. 14 and s. 28.

Whether a particular writing is an acknowledgment

(o) S. 13, 3 & 4 Will. 4, c. 27; *Jones v. Jones*, 16 M. & W. 699, 712; see *Doe v. Eyre*, 17 Q. B. 366, 369.

(p) Co. Lit. 242 a; *Doe v. Lawley*, 13 Q. B. 954.

(q) S. 14, 3 & 4 Will. 4, c. 27.

(r) *Burroughs v. McCreight*, 1 J. & L. 290.

(s) See Form, App. A, p. 290.

(t) *Ley v. Peter*, 3 H. & N. 101.

(u) S. 14.

(x) *Marwick v. Hardingham*, 15 Ch. D. 339; *Sanders v. Sanders*, 19 Ch. D. 373; see s. 34, *post*.

(y) See *post*, p. 216.

within the meaning of this section is a question for the judge (z), and not for the jury to decide (a).

**Disabilities.**

If a person is under the disability of infancy, coverture (b), lunacy or unsoundness of mind when his right accrues, a further period of six years is allowed from the termination of the disability, or from the death of such person, whichever first happens, notwithstanding that the period of twelve or six years has expired (c). Under the Act of 1833 the period allowed after disability was ten years (d), and absence beyond the seas was a disability (d). When once the statute begins to run no subsequent disability will stop it (e).

**Not as  
between  
mortgagor  
and mort-  
gagee.**

The provisions as to disability do not apply as between mortgagor and mortgagee, and therefore a mortgagor who has not been in possession for the statutory period has no further time within which to redeem by reason of any disability (f).

**Successive  
disabilities.**

Where a person dies under any disability no further period beyond the twelve years from the first accrual of his right, or the six years from his death, is allowed because of any disability in any other person (g); but where there are successive disabilities in the same person over-

(z) *Doe v. Edmonds*, 6 M. & W. 295; *Morrell v. Frith*, 3 M. & W. 402.

(a) *Ley v. Peter*, 3 H. & N. 101; *Fursdon v. Clogg*, 10 M. & W. 572; *Goode v. Job*, 1 E. & E. 6; *Incorporated Law Society v. Richards*, 1 Dr. & W. 258, 293; *Jayne v. Hughes*, 10 Exch. 430; *Doe v. Edmonds*, *supra*; *Morrell v. Frith*, *supra*.

(b) *Kennedy v. Lyell*, 15 Q. B. D. 491, 498.

(c) 37 & 38 Vict. c. 57, s. 3, substituted for s. 16, 3 & 4 Will. 4,

c. 27; *Doe v. Jesson*, 6 East, 80.

(d) 3 & 4 Will. 4, c. 27, s. 16; 37 & 38 Vict. c. 57, s. 4.

(e) *Doe v. Jones*, 4 T. R. 300; *Cotterell v. Dutton*, 4 Taunt. 826; *Rhodes v. Smethurst*, 6 M. & W. 351.

(f) *Kinsman v. Rouse*, 17 Ch. D. 104; *Forster v. Patterson*, 17 Ch. D. 132.

(g) S. 9, 37 & 38 Vict. c. 27, amending s. 18 of 3 & 4 Will. 4, c. 27; see *Doe v. Jesson*, 6 East, 80; *Tolson v. Kaye*, 3 B. & B. 217.



lapping each other, they have the same effect as one continuous disability (*h*).

At the expiration of thirty years from the accrual of the right to a person under disability the right is barred, although the person was under disability during the thirty years, or although six years has not expired since the removal of the disability on the death of such person (*i*). The time allowed under the previous Act was forty years (*k*).

Thirty years  
extreme  
period for  
disabilities.

Where a person having two estates in the same land at the same time, the one in possession, and the other in remainder or reversion, allows his estate in possession to be barred by the statute, in such case his estate in remainder or reversion will be barred also, unless some other person entitled to an estate limited or taking effect after or in defeasance of such estate in possession has recovered possession of the land, in which case a new right of entry will accrue when the remainder or reversion first becomes an estate in possession (*l*). It is not necessary that the recovery of the possession should be by action at law, as an entry and enjoyment of the property by the person entitled to the subsequent estate is a sufficient recovery (*m*).

Different  
estates in  
same person.

The distinction between this section and sect. 2 (*n*) is that, while sect. 2 applies to the case of an owner dispossessed by a rightful claimant to the particular estate, this section applies where a person is wrongfully dispossessed,

Distinction  
between s. 20  
and s. 2.

(*h*) *Borrows v. Ellison*, L. R. 6 Ex. 128.

(*i*) S. 5, 37 & 38 Vict. c. 57, repealing s. 17 of the Act of 1833; *Doe v. Bramston*, 3 A. & E. 63; *Jumpsen v. Pitchers*, 13 Sim. 327.

(*k*) S. 17, 3 & 4 Will. 4, c. 27, now repealed.

(*l*) S. 20, 3 & 4 Will. 4, c. 27; *Clarke v. Clarke*, Ir. R. 2 C. L. 395.

(*m*) *Doe v. Liveredge*, 11 M. & W. 517; *Doe v. Mouldsdale*, 16 M. & W. 689.

(*n*) S. 2 of the Act of 1874, substituted for s. 5 of the Act of 1833.

in which case if the owner of the particular estate is barred as to that estate, he and any one claiming through or under him is barred as to any future estate (*o*), unless of course some other person entitled to an intervening estate subsequent to the particular estate has recovered possession of that estate (*p*).

Tenant in tail.

The case of a tenant in tail, though not expressly mentioned, is governed by sect. 1 of the Act of 1874 (*q*) by reason of the interpretation clause in sect. 1 of the Act of 1833, which makes the ancestor of issue in tail the person through whom the issue claims (*r*). If, therefore, a right of entry has existed for more than twelve years in the ancestor who has been out of possession, the right of action is taken away from the issue in tail (*s*).

If tenant in tail barred, issue or remaindermen barred.

Where the right of any tenant in tail of any land or rent to make an entry or distress is barred by his neglect to make such entry or distress within the proper period, all the issue in tail, remaindermen, and reversioners whom he could have barred are barred also, just as if he had executed a disentailing deed and conveyed away the estate (*t*). The right of the issue of a tenant in tail is barred by sect. 1 of the Act of 1874 (*u*), and this sect. 21 carries the bar one step farther by extending it to all persons in remainder or reversion expectant on the estate tail whom the tenant in tail could have barred (*x*). The section does not, however, apply to the case where a tenant in tail has

(*o*) 2 Smith, L. C. 749 (ed. 9); *Doe v. Mouldsdale*, 16 M. & W. 689.

(*p*) *Doe v. Liversedge*, 11 M. & W. 517.

(*q*) 37 & 38 Vict. c. 57, substituted for a. 2, 3 & 4 Will. 4, c. 27.

(*r*) *Abergavenny v. Brace*, L. R. 7 Ex. 145; see *post*, ss. 21, 22.

(*s*) *Abergavenny v. Brace*, *supra*.

(*t*) S. 21, 3 & 4 Will. 4, c. 27; *Austin v. Llewellyn*, 9 Exch. 276; *Abergavenny v. Brace*, *supra*.

(*u*) 37 & 38 Vict. c. 57.

(*x*) *Abergavenny v. Brace*, *supra*.

conveyed away his own right and thus put it out of his power to recover (y).

If time has begun to run against the tenant in tail, but has not expired at his death, then those whom he could have barred have left to them only the residue of the time which remains to run, within which to prosecute their rights (z). The successors of the tenant in tail are thus placed, so to speak, by the operation of sects. 21 and 22, in the shoes of the tenant in tail, and therefore cannot claim the benefit of the savings in the act in regard to their own disabilities (a). These two sections are retrospective (a).

Time running against tenant in tail continues to run against remaindermen, &c.

Where a tenant in tail has executed an assurance effectual to bar his own issue, but ineffectual to bar remaindermen, or reversioners, by reason of the consent of the protector of the settlement not having been obtained, this assurance creates merely a base fee (b).

Assurance barring issue.

If, then, there has been a possession or receipt of rent under such assurance for a period of twelve years after the time at which the assurance, if it had then been executed, would without the consent of anyone have barred the future estates, *e.g.*, from the death of the protector, then such assurance is made effectual against the future estates (c). If the deed is not enrolled, it is not effectual to bar the issue, and sect. 6 does not apply (d). The conveyance must be of an estate tail and not of a life estate (e). The section does not apply to the case of an assurance by

(y) *Cannon v. Rimington*, 12 C. B. 1, 18.

(z) *Goodall v. Skerratt*, 24 L. J. Ch. 323; s. 22 of the Act of 1833.

(a) *Goodall v. Skerratt*, *supra*.

(b) S. 6, 37 & 38 Vict. c. 57, substituted for s. 23, 3 & 4 Will. 4,

c. 27; *Penny v. Allen*, 7 De G. M. & G. 409.

(c) S. 6 of 37 & 38 Vict. c. 57; s. 23 of 3 & 4 Will. 4, c. 27, is repealed.

(d) *Morgan v. Morgan*, 10 Eq. 99.

(e) *Mills v. Capel*, 20 Eq. 692.

a tenant in tail who, by a private Act, was prohibited from barring the entail of his estate (*f*).

Express  
trust.

Where land or rent is vested in a trustee upon an express trust, time does not begin to run against the *cestui que trust* until the land or rent has been conveyed to a purchaser for value (*g*), and then only in respect of such purchaser (*g*). The rights of the *cestui que trust* remain unaffected by lapse of time as against the trustee (*h*), and also as against all volunteers claiming under him, even though the *cestui que trust* has acquiesced in the conveyance to the volunteer (*i*); but as soon as there is a conveyance to a purchaser for value, time begins to run in respect of such purchaser and as against the *cestui que trust*.

Purchaser  
for value.

Inasmuch as the possession of the trustee is the possession of his *cestui que trust* (*k*), the right of the *cestui que trust* is not barred by the trustee treating a person, other than the *cestui que trust*, as entitled to the land, and paying the rent to such third person (*l*).

What cases  
within s. 25.

In order to bring a case within sect. 25, there must be land, a trustee in whom the land is vested, a *cestui que trust* for whose benefit in this respect the land is to be held, and an express trust, that is, a trust which arises upon the construction of the words of the written instrument under which it is created, and which does not rest upon any in-

(*f*) *Abergavenny v. Brace*, L. R. 7 Ex. 145.

(*g*) S. 25, 3 & 4 Will. 4, c. 27; *Burroughs v. McCreight*, 1 J. & L. 290, 304; *Magdalen College v. A.-G.*, 6 H. L. C. 189, 215; *A.-G. v. Flint*, 4 Hare, 147; see *Scott v. Scott*, 4 H. L. C. 1065.

(*h*) *Magdalen College v. A.-G.*, *supra*; *Law v. Bagwell*, 4 Dr. & War. 398; *Browne v. Radford*, W. N. (1874) 124. As to what

constitutes a purchaser for value, and what is his position if he knew of the trust, see Lewin on Trusts, p. 998 (ed. 9).

(*i*) *Brown v. Radford*, *supra*.

(*k*) *Hovenden v. Annesley*, 2 Sch. & Lef. 607, 633; *Lister v. Pickford*, 34 Beav. 576; *Churcher v. Martin*, 42 Ch. D. 312; *Beckford v. Wade*, 17 Ves. 89.

(*l*) *Lister v. Pickford*, *supra*.

ference of law imposing a trust upon the conscience. All these four things must be found upon the construction of the instrument which has to be construed (*m*). Where trustees take possession of property, which does not pass under the instrument creating the trust, sect. 25 does not apply, as they are not trustees of that particular property (*n*).

If the *cestui que trust's* rights are reversionary or in remainder, time will not commence to run as against him, and in favour of the purchaser, until the reversion or remainder has become an estate or interest in possession (*o*), or, if he be under disability, until the cesser of disability, or the death of the person under it (*p*). But the whole time in case of disability must not exceed thirty years from the first accrual of the right (*q*).

Where *cestui que trust* estate is a future one.

If both the trustee and *cestui que trust* (*r*), or the trustee only (*s*), have been out of possession for the statutory period both will be barred, though probably the *cestui que trust* in equity will be allowed any extended period for disability to which he would have been entitled had his title been a legal one (*t*).

Where trustee and *cestui que trust* have been out of possession.

Sect. 25 does not apply to a resulting trust, to an im-

Trusts to which s. 25 does not apply.

- (*m*) *Cunningham v. Foot*, 3 App. Cas. 974, 984; *Petre v. Petre*, 1 Drew, 371, 393; *Law v. Bagwell*, 4 Dru. & War. 398; *Drummond v. Sant*, L. R. 6 Q. B. 763; *Sands to Thompson*, 22 Ch. D. 614; *Dawkins v. Penrhyn*, 4 App. Cas. 51; *Salter v. Cavanagh*, 2 Dru. & Walsh, 668.
- (*n*) *Yardley v. Holland*, 20 Eq. 428.
- (*o*) 37 & 38 Vict. c. 57, s. 2; *A.-G. v. Magdalen College*, 18 Beav. 223, 239; *Thompson v. Simpson*, 1 Dru. & War. 459; Lewin on Trusts, p. 999 (ed. 9).
- (*p*) S. 3; *A.-G. v. Magdalen College*, *supra*.
- (*q*) S. 5, *ante*, p. 211.
- (*r*) *Llewellyn v. Mackworth*, 2 Eq. Abr. Cas. 578.
- (*s*) *Pentland v. Stokes*, 2 Ball & B. 68, 75; *Hovenden v. Annesley*, 2 Sch. & Lef. 607, 629.
- (*t*) Lewin on Trusts, p. 988 (ed. 9).

plied trust, or to a constructive trust (*u*). A security in the form of a trust for sale is a mortgage within sect. 7 (*x*), and is not a trust within sect. 25 (*y*). Sect. 25 applies to charities (*z*).

*Cestui que trust in possession.*

If the *cestui que trust* is let into possession by the trustee he becomes tenant at will to the trustee and the trustee's right to enter only accrues on the actual determination of such tenancy at will (*a*), and is not affected by the provision of sect. 7 (*b*). This, however, only applies where the *cestui que trust* is the actual occupant; if he acts as bailiff for the trustee, and allows an occupier to remain in possession without payment of rent or acknowledgment to anyone for the statutory period, the trustee will lose his title (*c*). If the *cestui que trust* is in possession under an implied trust it has been held that the case comes within sect. 7 (*d*). Where the *cestui que trust* has received the rents of the trust property, it is a question of fact in each case in what capacity he has received them, whether as agent for the trustees or under a claim of right. If he have received them under a claim of right adverse to the trustees and the other *cestui que trusts*, then the trustees and the other *cestui que trusts* are barred at the expiration of the statutory period (*e*).

(*u*) 3 & 4 Will. 4, c. 27, s. 25; *Sands to Thompson*, 22 Ch. D. 614; *Petre v. Petre*, 1 Drew, 371; *Salter v. Cavanagh*, 2 Dru. & Wal. 668.

(*x*) 37 & 38 Vict. c. 57, s. 7, repealing s. 28 of 3 & 4 Will. 4, c. 27.

(*y*) *Locking v. Parker*, 8 Ch. 30.

(*z*) *Magdalen College v. A.-G.*, 6 H. L. C. 189; *Charity Commissioners v. Wyhants*, 2 Jones & La. 182.

(*a*) *Garrard v. Tuck*, 8 C. B. 231; *Drummond v. Sant*, L. R. 6 Q. B. 763.

(*b*) *Ante*, p. 205.

(*c*) *Melling v. Leak*, 16 C. B. 652.

(*d*) *Doe v. Rock*, 4 M. & Gr. 30; *Sands to Thompson*, 22 Ch. D. 614; see *Drummond v. Sant*, *supra*.

(*e*) *Burroughs v. McCreight*, 1 J. & L. 290.

The Judicature Act, 1873, provides that no claim of a *cestui que trust* against his trustee for any property held upon an express trust shall be held to be barred by any Statute of Limitations (f). Judicature Act, 1873, s. 25.

Equitable rights are barred by the statutes to the same extent as they would have been barred had they been legal rights (g). Equitable rights.

The statutes do not interfere with any equitable jurisdiction to refuse relief, on the ground of acquiescence, to any person who has not been barred by the statutes (h). Acquiescence.

In cases of concealed fraud the equitable right of the person who has been deprived by such fraud accrues when the fraud is, or might with reasonable diligence have been, discovered (i). This, however, does not affect the rights of a *bond fide* purchaser for value without notice of the fraud (i). It is a question of fact in each case as to what is, or is not, concealed fraud (k). A purchaser for value who purchases through an agent who knows of the fraud, is not protected (l). Concealed fraud.

Where a mortgagee obtains possession or receipt of the profits of any land or rent comprised in his mortgage, the mortgagor or anyone claiming through him has twelve Mortgagor and mortgagor.

(f) S. 25, sub-s. 2, 36 & 37 Vict. c. 66; App. B, p. ; see *Re Cross*, 20 Ch. Div. 109, 121.

(g) S. 24, 3 & 4 Will. 4, c. 27; *Archbold v. Scully*, 9 H. L. C. 360; *Pugh v. Heath*, 7 App. Cas. 235.

(h) S. 27; *Beckford v. Wade*, 17 Ves. 89, 97; *Hovenden v. Annesley*, 2 Sch. & L. 607, 633.

(i) S. 26 of 3 & 4 Will. 4, c. 27.

(k) *Rains v. Buxton*, 14 Ch. D. 537; *Vane v. Vane*, 8 Ch. 383;

*Chetham v. Hoare*, 9 Eq. 571; *Ecclesiastical Commissioners v. N. E. Ry.*, 4 Ch. D. 845, 860; *Dean v. Thwaite*, 21 Beav. 621; *Trotter v. Maclean*, 13 Ch. D. 574, 584; *Darves v. Bagnall*, 23 W. R. 690; *Archbold v. Scully*, 9 H. L. C. 360, 384; *Willis v. Howe*, [1893] 2 Ch. 545; *Petre v. Petre*, 1 Drew. 371, 397; *Sturgis v. Morse*, 24 Beav. 541; *Lewis v. Thomas*, 3 Hare, 26; *Manby v. Bewicke*, 3 K. & J. 342.

(l) *Vane v. Vane*, *supra*.

Mortgages in possession.

Acknowledgment of title.

Form of acknowledgment.

When to be made.

By whom :

years from that time, or from the last written acknowledgment of his title by the mortgagee to him or his agent, in which to redeem (*m*). The acknowledgment in order to be effectual must be an acknowledgment of the mortgagor's title or right to redeem (*n*). It must be made to the mortgagor or someone claiming his estate or to the agent of either (*o*). It must be in writing and signed by the mortgagee or person claiming through him (*o*), and the signature of an agent is not sufficient (*o*).

An acknowledgment may be contained in letters signed by the mortgagee and sent to the mortgagor or his agent (*p*); but a mere recital in a deed of transfer to a third person that the mortgage is still subsisting is not sufficient (*q*); it may also be inferred from the fact that the mortgagee is keeping accounts (*r*).

As the effect of the statute is to extinguish the right to the land at the expiration of the statutory period, an acknowledgment after the statutory period has expired will not restore the mortgagor's title (*s*); nor will an acknowledgment to the mortgagor after his bankruptcy have any effect (*t*).

If there is more than one mortgagor, or person claiming

(*m*) S. 7, 37 & 38 Vict. c. 57, repealing s. 28, 3 & 4 Will. 4, c. 27; *Raffety v. King*, 1 Keen, 601, 610; see *Browns v. Cork*, 1 Dru. & Wal. 700; *Hodle v. Healey*, Mad. & Geld. 181.

(*n*) *Trulock v. Robey*, 12 Sim. 402; *Pendleton v. Rooth*, 1 Giff. 35.

(*o*) *Richardson v. Younge*, 6 Ch. 478.

(*p*) *Richardson v. Young*, *supra*; *Hodle v. Healey*, Mad. & Geld. 181; *Trulock v. Robey*, 12 Sim. 402; *Stansfield v. Hobson*, 16

Beav. 236; *Thompson v. Bowyer*, 9 Jur. N. S. 863.

(*q*) *Lucas v. Dennison*, 13 Sim. 584.

(*r*) *Baker v. Wetton*, 14 Sim. 426; *Hodle v. Healey*, *supra*.

(*s*) *Lyell v. Kennady*, 18 Q. B. D. 796, 814; *Re Alison*, 11 Ch. D. 284; *Sanders v. Sanders*, 19 Ch. D. 373, in which *Stansfield v. Hobson*, 16 Beav. 236, was not followed; *Chapman v. Corps*, 41 L. T. 22.

(*t*) *Markwick v. Hardingham*, 15 Ch. D. 339.



through him, an acknowledgment given to any one of them or his agent is as effectual as if given to all (u). Several mortgagors.

If there is more than one mortgagee, or person claiming his estate, an acknowledgment by one or more of them is effectual only against those giving it, and those claiming the mortgage money or land through them or entitled to interests after or in defeasance of their interests (u); such an acknowledgment does not give any right to redeem against any person entitled to any other divided or undivided part of the land or rent (u). When one or more of several mortgagees has given an acknowledgment and is entitled to one undivided part of the mortgaged land, and not to any ascertained part of the mortgage money, the mortgagor may redeem such divided part of the land on payment of a part of the mortgage money proportionate to the value of such divided part (x). Several mortgagees.

When several mortgagees are joint mortgagees, who appear by the mortgage deed to advance the money upon a joint account as trustees, an acknowledgment by one of them is wholly ineffectual (y). The provisions of the section as to an acknowledgment by one of several mortgagees apply only where they have separate interests in the money or the land (y). If joint mortgagees are not trustees they must almost of necessity be entitled to some distinct interests in the mortgage money (y). Joint mortgagees.

If a mortgagee takes possession, not as mortgagee, but as purchaser of the equity of redemption which happens to be a life estate, time does not begin to run against those in remainder until the expiration of the life estate (z). Purchase of equity of redemption by mortgagee.

If the mortgagee has been in possession of part of the Mortgagee

(u) S. 7 of 37 & 38 Vict. c. 57.

(x) S. 7 of 37 & 38 Vict. c. 57.

(y) *Richardson v. Youngs*, 6 Ch.

(z) *Raffety v. King*, 1 Keen,

601; *Hyde v. Dallaway*, 2 Hare,

528.

in possession  
of part of  
land.

land for the statutory period, the right of the mortgagor to redeem that part is barred, though he held possession of the rest (a). The old rule was that no lapse of time barred the right of a mortgagor to redeem the whole, provided he held possession of part (b).

A security in the form of a conveyance to the lender in trust for sale is a mortgage within the meaning of sect. 7 (c), and is not within sect. 25 (d).

Where mort-  
gagor may  
redeem after  
statutory  
period.

If by the terms of the mortgage the mortgagor may redeem at any time during a period longer than the statutory period, Lord Cranworth thought that the statute did not apply so as to make mere possession by the mortgagee for the statutory period without acknowledgment a bar to redemption (e).

No saving for  
disabilities.

This statutory period of twelve years is absolute and is not extended by any disability on the part of a mortgagor, as sect. 3 (f), which saves the rights of persons under disability, does not apply (g).

It was at one time doubted whether a mortgagee, who was not in possession or receipt of the profits within the statutory period, and to whom no acknowledgment under sect. 14 had been given, was not barred of his right to eject the mortgagor by reason of the provisions of sects. 2 and 3 (h), for that his right had accrued more than twenty years previously (i). These doubts have been removed by

Mortgagee  
not in pos-  
session ;

(a) S. 7, 37 & 38 Vict. c. 57 ;  
*Kinsman v. Rouse*, 17 Ch. D.  
104.

(b) *Rakestraw v. Bruyer*, Mose-  
ley, 189 ; *Kinsman v. Rouse*,  
*supra*.

(c) 37 & 38 Vict. c. 57.

(d) *Locking v. Parker*, L. R. 8  
Ch. 30 ; *Re Alison*, 11 Ch. D.  
284.

(e) *Alderson v. White*, 2 De G.  
& J. 97, 109.

(f) 37 & 38 Vict. c. 57 ; s.  
16 of 3 & 4 Will. 4, c. 27, is re-  
pealed.

(g) *Forster v. Patterson*, 17 Ch.  
D. 132 ; *Kinsman v. Rouse*, 17  
*id.* 104.

(h) 3 & 4 Will. 4, c. 27.

(i) *Doe v. Williams*, 5 A. & E. 291.

7 Will. 4, c. 28 (*j*), and now a person entitled to or claiming under a mortgage of land, as defined by sect. 1 (*k*), may make an entry or bring an action to recover the land within twelve (*l*) years after the last payment of principal or interest (*m*).

7 Will. 4,  
c. 28.

A purchaser of the mortgaged premises by conveyance from the mortgagee and the mortgagor is a "person claiming under any mortgage" within the meaning of the statute (*n*).

Purchaser  
from mort-  
gagee and  
mortgagor.

This enactment prevents a mortgagee, whose interest has been regularly paid, from being barred, and makes time begin to run only from the last payment of principal or interest (*o*). The payment of such principal or interest, in order to come within the statute, must amount to an acknowledgment of the mortgagee's title; it must, therefore, be made by the mortgagor or his agent, or by some person liable to pay the principal and interest on his behalf (*p*), or by someone who, by the terms of the contract, can make a tender and from whom a tender must be accepted by the mortgagee for the defeasance or redemption of the mortgage (*q*). A payment of rent to the mortgagee by the tenant of the mortgagor on notice from the mortgagee is not sufficient (*r*). When several estates in different counties are included in the same mortgage, a payment to the mortgagee, by the receiver appointed to

Effect of  
7 Will. 4,  
c. 28.

Payment of  
interest must  
be by mort-  
gagor or  
agent.

Payment by  
a tenant.

Payment of  
interest by  
a receiver.

(*j*) App. B, p. 331.

(*k*) 3 & 4 Will. 4, c. 27.

(*l*) 37 & 38 Vict. c. 57, s. 9.

(*m*) *Doe v. Lightfoot*, 8 M. & W. 553; *Wilkinson v. Hall*, 3 B. N. C. 508; *Doe v. Giles*, 5 Bing. 421.

(*n*) *Doe v. Massey*, 17 Q. B. 373.

(*o*) *Hemming v. Blanton*, 42 L. J. C. P. 158.

(*p*) *Cann v. Taylor*, 1 F. & F. 651; *Ames v. Mannering*, 26 Beav. 583; *Newbould v. Smith*, 33 Ch. D. 127; *Harlock v. Ashberry*, 19 Ch. D. 539; *Chinnery v. Evans*, 11 H. L. C. 115.

(*q*) *Lewin v. Wilson*, 11 App. Cas. 639.

(*r*) *Harlock v. Ashberry*, 19 Ch. D. 539.

collect the rents, of interest out of the rents of one estate preserves the mortgagee's remedy against all (s).

Mortgagee  
can some-  
times recover  
though  
mortgagor  
barred.

A mortgagee, to whom principal or interest has been paid within twelve years, may sometimes be able to recover the land against a third person, though the mortgagor himself is barred, unless of course the mortgagor's title was barred when he mortgaged the premises (t).

Title of  
mortgagee  
on foreclosure  
absolute.

The effect of an order for a foreclosure absolute obtained by a legal mortgagee is to vest the ownership in him, and to give him twelve years from such order in which to recover possession (u).

Ecclesiastical  
and eleemosy-  
nary corpo-  
rations sole.

An ecclesiastical or eleemosynary corporation sole must take proceedings, after the right of action has accrued, within the period during which two persons in succession have held the office or benefice in respect of which the land is claimed, and six years after the appointment of a third person, if such period amounts to sixty years or, if not, during the period of sixty years (x). Before this enactment ecclesiastical corporations were not affected by Statutes of Limitation, and no bishop or dean could do anything to bind their successors, without the assent of the dean and chapter, nor could parsons or vicars without their patron's assent (y), but each successor had five years in which to make his claim or entry, and if he suffered that five years to pass he was bound during his own time (z).

The special provisions of this section apply only to spiritual or eleemosynary corporation sole, and no other lay corporation can avail itself of these provisions (a). The

(s) *Chinnery v. Evans*, 11 H. 27.

L. C. 115.

(y) Plow. 538.

(t) *Ford v. Ager*, 2 H. & C. 279.

(z) Plow. 538; 4 Hen. 7, c. 24; see *Runcorn v. Cooper*, 5 B. & C. 696.

(u) *Heath v. Pugh*, 6 Q. B. D. 345; 7 App. Cas. 235.

(a) *Irish Land Commission v. Grant*, 10 App. Cas. 14.

(x) S. 29 of 3 & 4 Will. 4, c.

Ecclesiastical Commissioners, in whom the rights of certain spiritual corporations sole are vested by 3 & 4 Vict. c. 113, have, by virtue of sect. 7 of that Act, the same length of time as the corporation sole to whose rights they succeed had, within which to enforce their right to possession (b). If, however, the lay corporation have been in possession and have been dispossessed, they have only the same time as any other person (c).

The Irish Land Commission, in whom the tithe rent-charge has become vested by virtue of the Irish Church Act, 1869 (d), cannot in any case avail themselves of the provisions of sect. 29 even when the right accrued to the spiritual corporation sole to whose rights they succeeded (e).

Proceedings by a patron to recover the right to an advowson must be brought within the period during which three clerks in succession have held the same adversely to the right of the patron or some one through whom he claims, or the full period of sixty years, whichever is the longer (f). This section was afterwards applied to the case of a bishop claiming a right as patron to collate or bestow any ecclesiastical benefice (g). If, after possession of an ecclesiastical benefice by a clerk adversely to the patron, the crown or ordinary present such clerk thereto after a lapse, such clerk is deemed to have obtained possession adversely to the patron; but if the clerk be presented by the crown on the avoidance of the benefice by the promotion of the incumbent to a bishoprick, the in-

Advowson.

Presentation  
of clerk after  
lapse or  
avoidance.

(b) *Ecclesiastical Commissioners v. Rowe*, 5 App. Cas. 736; dissentiente Ld. Blackburn.

(c) *Ecclesiastical Commissioners v. Rowe*, *supra*.

(d) 32 & 33 Vict. c. 42.

(e) *Irish Land Commission v. Grant*, *supra*.

(f) S. 30, 3 & 4 Will. 4, c. 27.

(g) 6 & 7 Vict. c. 54.

cumbency of the clerk so appointed is deemed a continuation of the incumbency of his predecessor (*h*).

Every person claiming a right to present, or an advowson, by virtue of an estate which the owner of an estate tail in the advowson might have barred, is deemed to be a person claiming through the person entitled to such an estate tail, and the right to take proceedings is limited accordingly (*i*).

Limit of  
time for  
recovery of  
advowson.

No proceedings can be taken by a patron to recover an advowson after one hundred years from the time at which a clerk obtained possession adversely to the patron, unless a clerk subsequently obtain possession of the benefice on the presentation of the patron (*k*).

Right extin-  
guished ;

At the end of the period limited by the statutes the right and title of the person out of possession to the land or rent is extinguished (*l*). The former Statutes of Limitation merely barred the remedy and did not touch the right ; but under the present Acts, when the remedy is barred, the right and title of the real owner is extinguished, and a parliamentary conveyance is made of the fee simple to the party in possession (*m*). After the statutory period has expired, no written acknowledgment (*n*), payment of rent (*o*), re-entry (*p*), or ratification of acts done by a

and cannot  
be revived.

- (*h*) S. 31, 3 & 4 Will. 4, c. 27. A. & E. 44 ; *Scott v. Nixon*, 3 Dru. & War. 388 ; *Chapman v. Corpe*, 41 L. T. 22 ; *Lyell v. Kennedy*, 18 Q. B. D. 796.
- (*i*) S. 32, 3 & 4 Will. 4, c. 27. (*n*) *Sanders v. Sanders*, 19 Ch. D. 373, 379 ; *Re Alison*, 11 Ch. D. 284, 296 ; *Lyell v. Kennedy*, *supra* ; *Markwick v. Hardingham*, 15 Ch. D. 339.
- (*k*) S. 33, 3 & 4 Will. 4, c. 27. (*o*) *Lyell v. Kennedy*, *supra*.
- (*l*) S. 34, 3 & 4 Will. 4, c. 27. (*p*) *Bryan v. Cowdal*, 21 W. R. 693 ; *Brassington v. Llewellyn*, 27 L. J. Ex. 297.
- (*m*) *Incorporated Society v. Richards*, 1 Dru. & War. 258, 289 ; *Bolling v. Hobday*, 31 W. R. 9 ; *Doe v. Sumner*, 14 M. & W. 39 ; *Holmes v. Newlands*, 11

person before the statutory period had expired (*q*), will restore the title which has been extinguished.

An ancient quit-rent, whether payable in respect of a freehold (*r*) or copyhold (*s*), of which no payment or acknowledgment has been made for a period of twelve years, is at the end of that period extinguished (*r*). Although a rent-charge is extinguished at the end of the statutory period as a charge on the land yet, if there is a covenant for its repayment, the rights under that covenant would not be affected (*t*).

Probably the possession for the period required by the statutes to give a good title to a wrongful possessor must be either by one person or by several persons who claim the one from the other by will, descent, or conveyance (*u*).

Possession  
for statutory  
period by  
several per-  
sons.

The statute does not apply to Jamaica (*x*); turnpike tolls are not "land" (*y*); the poor of a parish are a class of persons within sect. 1 (*z*); tithe rent-charge created under 1 & 2 Vict. c. 109 is "rent" within sect. 1 (*a*); the statute does not apply to rent reserved on a demise under seal (*b*); "rent" includes all services and suits for which distress can be made, but the service demanded from a tenant of keeping a grindstone for the parish is not rent (*c*),

(*q*) *Lyell v. Kennedy*, *supra*.

295.

(*r*) *De Beauvoir v. Owen*, 5 Exch. 166; *James v. Salter*, 3 B. N. C. 544; *Irish Land Commission v. Grant*, 10 App. Cas. 14, 27.

(*y*) *Mellish v. Brook*, 3 Beav. 22.

(*s*) *Howitt v. Harrington*, [1893] 2 Ch. 497.

(*z*) *Magdalen College v. A.-G.*, 6 H. L. C. 189; see *A.-G. v. Davey*, 4 De G. & J. 136.

(*t*) *Manning v. Phelps*, 24 L. J. Ex. 62.

(*a*) *Irish Land Commission v. Grant*, 10 App. Cas. 14.

(*u*) *Doe v. Barnard*, 13 Q. B. 945.

(*b*) *Grant v. Ellis*, 9 M. & W. 113.

(*x*) *Pitt v. Dacre*, 3 Ch. D.

(*c*) *Doe v. Hinde*, 2 M. & Rob. 441.

W.Y.E.

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though sweeping the church and tolling the bell is (d); charities are within the Act though protected by sect. 25 (e).

(d) *Doe v. Benham*, 7 Q. B. 976.

(e) *Magdalen College v. A.-G.*,  
*supra*; *A.-G. v. Davey*, *supra*.



## CHAPTER XXI.

### EVIDENCE.

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| <ol style="list-style-type: none"> <li>1. <i>Ownership</i>, 227.</li> <li>2. <i>Notice to Quit</i>, 230.</li> <li>3. <i>Breach of Covenant or Condition</i>, 231.</li> <li>4. <i>Assignment or Subletting</i>, 232.</li> <li>5. <i>Distress</i>, 232.</li> <li>6. <i>Insufficient Distress</i>, 232.</li> <li>7. <i>Eviction</i>, 233.</li> <li>8. <i>Vacant Possession</i>, 234.</li> <li>9. <i>Assent of Executor to Bequest of Leaseholds</i>, 235.</li> </ol> | <ol style="list-style-type: none"> <li>10. <i>Sunrise and Sunset</i>, 235.</li> <li>11. <i>Authority of an Agent</i>, 236.</li> <li>12. <i>Elegit</i>, 236.</li> <li>13. <i>Copyholds</i>, 237.</li> <li>14. <i>Title of Parson</i>, 237.</li> <li>15. <i>Title of Churchwardens</i>, 238.</li> <li>16. <i>Will of Lands</i>, 238.</li> <li>17. <i>Heirship</i>, 240.</li> <li>18. <i>Deeds and Documents</i>, 247.</li> <li>19. <i>Award</i>, 251.</li> </ol> |
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#### 1. *Ownership.*

ACTUAL possession of the land (a), or receipt of the rents thereof (b), is *prima facie* evidence of seisin in fee, and is sufficient to maintain an action of ejectment; but this presumption may be rebutted by proof of title in someone else (bb). The sum received as rent may, however, be so small as to raise the presumption that it is merely a quit-rent (c). The receipt of the rents can be shown by the production of receipts for rent which were

Possession.

Receipt of rent.

(a) *Peaceable v. Watson*, 4 Taunt. 16; *Doe v. Dyball*, M. & M. 346; *Doe v. Barnard*, 13 Q. B. 945; *Doe v. Penfold*, 8 C. & P. 536; *Asher v. Whitlock*, L. R. 1 Q. B. 1, in which case *Dixon v. Gayfore*, 17 Beav. 421, was commented on.

(b) *Do v. Barnard*, *supra*.

(c) *Doe v. Johnson*, Gow, 173; *Reynolds v. Reynolds*, 12 Ir. Eq. Rep. 172, 181.

(b) *Jayne v. Price*, 5 Taunt.

in the custody of a deceased occupier (*d*), by entries made in the ordinary course of business by a deceased agent or someone else on his behalf, if signed by him (*e*), or by admissions of payment by an occupier (*f*). Payment of rent under a lease is *prima facie* evidence of title to the leasehold interest (*g*).

Acts of  
ownership.

The title to property may also be shown by evidence of unequivocal acts of ownership exercised over it, such as granting leases (*h*), which may be proved by production of the lessor's counterpart (*i*); cutting wood and felling timber (*k*); building upon the land or doing or paying for repairs (*l*); perambulating the land (*m*); or, in the case of a manor, holding courts and appointing keepers (*n*). Merely shooting over land or appointing keepers (*o*), or being assessed to the land tax (*p*), is not evidence of ownership of the land. When acts of ownership are exercised upon or in reference to land which is not the actual part in dispute it must be shown that the *locus in quo* and the land in dispute are part of one entire estate or district (*q*).

Declarations  
and admis-  
sions.

The declarations or admissions of a deceased occupier or

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| <p>(<i>d</i>) <i>Doe v. Savage</i>, 1 Car. &amp; K. 487.</p> <p>(<i>e</i>) <i>Doe v. Stacey</i>, 6 O. &amp; P. 139; <i>Doe v. Michael</i>, 17 Q. B. 276.</p> <p>(<i>f</i>) <i>Doe v. Beckett</i>, 4 Q. B. 601; <i>Hogg v. Norris</i>, 2 F. &amp; F. 246.</p> <p>(<i>g</i>) <i>Bikker v. Beeston</i>, 1 F. &amp; F. 685; <i>Mellers v. Brown</i>, 1 H. &amp; C. 686.</p> <p>(<i>h</i>) <i>Doe v. Pulman</i>, 3 Q. B. 622; <i>Magdalen Hospital v. Knotts</i>, 8 Ch. D. 709.</p> <p>(<i>i</i>) Cases in last note, and <i>Homes v. Pearce</i>, 1 F. &amp; F. 283.</p> <p>(<i>k</i>) <i>Doe v. Arkwright</i>, 5 C. &amp;</p> | <p>P. 575, 578; <i>Curzon v. Lomax</i>, 5 Esp. 60.</p> <p>(<i>l</i>) <i>Doe v. Clifford</i>, 2 C. &amp; K. 448; <i>Jones v. Williams</i>, 2 M. &amp; W. 326.</p> <p>(<i>m</i>) <i>Woolway v. Rowe</i>, 1 A. &amp; E. 114.</p> <p>(<i>n</i>) <i>Doe v. Heakin</i>, 6 A. &amp; E. 495.</p> <p>(<i>o</i>) <i>Tyrwhitt v. Wynne</i>, 2 B. &amp; Ald. 554.</p> <p>(<i>p</i>) <i>Doe v. Arkwright</i>, 1 F. &amp; F. 575.</p> <p>(<i>q</i>) <i>Tyrwhitt v. Wynne</i>, 2 B. &amp; Ald. 554; <i>Jones v. Williams</i>, 2 M. &amp; W. 326.</p> |
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owner (*r*), whether verbal or written, as to the ownership of the land which he occupied, are admissible evidence for all purposes against all persons (*s*), and the admissions of an occupier, who is alive, are admissible evidence against any person who claims in respect of the same interest as the occupier who made the admission (*t*). Admissions of a tenant are not, however, admissible evidence to derogate from his landlord's rights (*u*). It must be shown that the person, whose declarations or admissions are sought to be proved, was in possession of the property to which the declaration or admission relates (*x*), and when necessary, that he is dead, not merely seriously ill (*y*).

The ownership of land may also be proved by documentary evidence, such as title deeds, or secondary evidence thereof when admissible; and by evidence of the mode in which the property has been enjoyed (*z*).

Documentary  
evidence.

A demise, grant or gift of property *prima facie* passes everything that belongs to it, though whether particular premises are or are not parcel of such property is a question of fact (*a*). The rule is that if a sufficient description of

Parcel or  
no parcel.

(*r*) *Doe v. Coulthred*, 7 A. & E. 235; *Gery v. Redman*, 1 Q. B. D. 161.

(*s*) *Peaceable v. Watson*, 4 Taunt. 16; *Crease v. Barrett*, 1 C. M. & R. 919, 931; *Doe v. Arkwright*, 5 C. & P. 575; *Mountnoy v. Collier*, 1 E. & B. 630, 640; *Davies v. Pierce*, 2 T. R. 53; *Doe v. Langfield*, 16 M. & W. 497, 514; *R. v. Birmingham*, 1 B. & S. 763; *R. v. Exeter*, L. R. 4 Q. B. 341; *Carne v. Nicoll*, 1 B. N. C. 430; *Sly v. Sly*, 2 P. D. 91; *Higham v. Ridgway*, 2 S. L. C. p. 370 (ed. 9).

(*t*) *Woolway v. Rowe*, 1 A. & E. 114.

(*u*) *R. v. Bliss*, 7 A. & E. 550; *Papendick v. Bridgwater*, 24 L. J. Q. B. 289.

(*x*) *Peaceable v. Watson*, 4 Taunt. 16; *Doe v. Cartwright*, 1 C. & P. 218.

(*y*) *Harrison v. Blades*, 3 Camp. 457.

(*z*) *Doe v. Jordan*, 4 C. & P. 146.

(*a*) *Doe v. Burt*, 1 T. R. 701; *Brown v. Armstrong*, 7 Ir. Rep. C. L. 130; *Manning v. Fitzgerald*, 29 L. J. Ex. 24; *Francis*

the premises is set out, a *falsa demonstratio* will be rejected, but if the premises are described in general terms, and a particular description is added, the latter controls the former (b). If words are ambiguous or indeterminate they may be explained by parol (c), and evidence is admissible to prove the state and condition and the local names of the property demised, granted, or given (d); and any collateral facts may be proved from which the intention of the parties to include certain premises can be gathered (e), though the intention itself may not be given in evidence (f). Such collateral facts are, that the land was in the occupation of a certain person (g), or was staked out (h).

## 2. Notice to Quit.

A notice to quit may be verbal or in writing (i); if in writing, the contents may be proved by a copy without giving notice to produce the original (k); if there was an attesting witness he need not be called (l).

### Service of.

Service of a notice to quit can be proved by a memorandum of service indorsed upon it in the ordinary course of business by the person who served it, if he is dead (m);

v. *Hayward*, 22 Ch. D. 177;  
*Goodtill v. Southern*, 1 M. & S.  
299.

(b) *Doe v. Galloway*, 5 B. & Ad.  
43; *Barton v. Dawes*, 10 C. B.  
261; *Doe v. Ashley*, 10 Q. B.  
663; *Doe v. Carpenter*, 16 Q. B.  
181; see *Doe v. Hubbard*, 15 Q.  
B. 227.

(c) *Paddock v. Fradley*, 1 Cr.  
& Jer. 90; *Dyne v. Nutley*, 14  
C. B. 122.

(d) *Doe v. Burt*, 1 T. R. 701;  
*Doe v. Hubbard*, 15 Q. B. 227,  
244; *Waterpark v. Fennell*, 7 H.  
L. C. 650.

(e) *Doe v. Burt*, *supra*.

(f) *Doe v. Oxenden*, 3 Taunt.  
147; *Minton v. Geiger*, 28 L. T.  
449; *Doe v. Hubbard*, *supra*.

(g) *Doe v. Burt*, *supra*; *Dyne*  
*v. Nutley*, *supra*.

(h) *Skull v. Glenister*, 33 L. J.  
C. P. 185.

(i) *Ante*, p. 44.

(k) *Doe v. Somerton*, 7 Q. B.  
58.

(l) 17 & 18 Vict. c. 125, s. 23;  
*Doe v. Durnford*, 2 M. & S. 62.

(m) *Doe v. Turford*, 3 B. & Ad.  
890; *Stapylton v. Clough*, 2 E. &  
B. 933.

or by admissions of the tenant, *e.g.*, by his arranging for a valuation as outgoing tenant (*n*).

### 3. *Breach of Covenant or Condition.*

The onus of proof is on the plaintiff to prove the breach whether it arises from commission or omission (*o*). If the covenant or condition be to do an act, or not to do an act without permission (*p*), the plaintiff must give some evidence that the act has not been done, or that permission has not been given, however difficult it may be for him to do so (*q*).

The landlord must prove a non-insurance, *i.e.*, he must give some evidence of the non-insurance (*r*), and if the term is vested in an assignee, that neither the original lessee nor the assignee has insured (*s*). Mere non-production of a policy of insurance, or of receipts for premiums by the defendant after notice to produce has been given to him, is not sufficient evidence of non-insurance (*t*), unless of course such non-production is the substantive breach. Statements by the tenant that he has not insured, and that he wanted the money for other purposes are sufficient evidence of non-insurance during the year in which such statements were made (*u*). It is sufficient to show that the premises were uninsured for any period, however short, during the term (*x*).

(*n*) *Doe v. Hall*, 5 M. & Gr. 6 Q. B. 245, 294; *Doe v. Whitehead*, 8 A. & E. 571.

(*o*) *Doe v. Robson*, 2 O. & P. 245. (*s*) *Chaplin v. Reid*, 1 F. & F. 315.

(*p*) *Toleman v. Portbury*, L. R. 6 Q. B. 245. (*t*) *Doe v. Whitehead*, *supra*.

(*q*) *Doe v. Whitehead*, 8 A. & E. 571. (*u*) *Price v. Worwood*, 4 H. & N. 512.

(*r*) *Toleman v. Portbury*, L. R. 134. (*x*) *Doe v. Shewin*, 3 Camp.

Non-insurance.

4. *Assignment or Subletting.*

Assignment or underletting can be proved by production of the assignment or underlease, or by secondary evidence thereof when it is in the possession of the defendant who will not produce it, or by admissions of the occupier (*y*). If some person, other than the lessee, is found upon the premises, appearing to be the tenant thereof, that is sufficient *prima facie* evidence of an assignment or underletting (*z*); in such case the onus is upon the lessee to explain such possession (*a*).

5. *Distress.*

There need not be an actual seizure to create a distress; it is enough if the landlord or his agent takes effective means to prevent the removal of the articles off the premises on the ground of the rent being in arrear (*b*). Thus, a declaration that the goods shall not be removed until the rent is paid (*c*); going over the premises and giving a written notice that goods are distrained (*d*); demand of rent and expenses of levy (*e*), have been held sufficient to create a distress.

6. *Insufficient Distress (f).*

The plaintiff must prove that every part of the premises has been searched (*g*), unless he has been prevented by the

(*y*) *Doe v. Rickarby*, 5 Esp. 4.

(*z*) *Doe v. Williams*, 9 D. & R. 30; *Doe v. Durnford*, 2 C. & J. 667; *Doe v. Rickarby*, *supra*; *Doe v. Murless*, 6 M. & S. 110; *Doe v. Payne*, 1 Stark. 86; *Paull v. Simpson*, 9 Q. B. 365; *Wollaston v. Hakewill*, 3 M. & Gr. 297; *Williams v. Heales*, L. R. 9 C. P. 177.

(*a*) *Doe v. Rickarby*, *supra*.

(*b*) *Cramer v. Mott*, L. R. 5 Q. B. 357.

(*c*) *Wood v. Nunn*, 5 Bing. 10; *Cramer v. Mott*, *supra*.

(*d*) *Swann v. Falmouth*, 8 B. & C. 456.

(*e*) *Hutchins v. Scott*, 2 M. & W. 809.

(*f*) Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 210; see App. B, p. 343; County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 139; see App. B, p. 271.

(*g*) *Price v. Worwood*, 4 H. &

locking up of the premises or otherwise from entering to distrain, in which case that very fact is sufficient evidence that there was no sufficient distress (*h*). Although there may be sufficient goods upon the premises, yet there is no "sufficient distress" to be found, within the meaning of the Acts, unless the goods are so visibly there that a broker going to distrain would, using reasonable diligence, be able to find them (*i*). The goods of a person put in by the landlord to take care of the premises (*k*), goods privileged from distress, or goods protected by the Lodgers' Goods Protection Act (*l*), 1871, are not to be taken into account. The prospective value of growing crops, after deducting the expenses of getting them, must be taken into account (*m*). Evidence that there was no sufficient distress on any day after the right to re-enter accrued is sufficient (*n*).

#### 7. *Eviction.*

Anything done by the landlord, or by a person claiming through or under him, with the intention of depriving the tenant of the enjoyment of the whole or part (*o*) of the premises demised amounts to an eviction (*p*), such as letting the premises to another person (*q*) or permanently taking possession of the whole or part of the premises to the exclusion of the lessee (*p*). A mere temporary tres-

N. 512; *Rees v. King*, Forrest, 19.

(*h*) *Doe v. Dyson*, M. & M. 77; *Doe v. Roe*, 5 D. & L. 272; *Hammond v. Mather*, 3 F. & F. 151; *Romily v. Fycroft*, 4 W. R. 26.

(*i*) *Doe v. Franks*, 2 C. & K. 678.

(*k*) *Wheeler v. Stevenson*, 6 H. & N. 155.

(*l*) 34 & 35 Vict. c. 79.

(*m*) *Ex parte Arnison*, L. R. 3

Ex. 56.

(*n*) *Doe v. Fuchau*, 15 East, 286.

(*o*) *Upton v. Townsend*, 17 C. B. 30; *Smith v. Raleigh*, 3 Camp. 513; *Salmon v. Smith*, 1 Wms. Saunders, 204 (note 2).

(*p*) *Upton v. Townsend*, *supra*; *Pellatt v. Boosey*, 31 L. J. C. P. 281; *Smith v. Raleigh*, *supra*.

(*q*) *Hall v. Burgess*, 5 B. & C. 332; *Pellatt v. Boosey*, *supra*.

By title  
paramount.

pass (*r*), or taking possession of deserted premises (*s*), or preventing the tenant from using an easement which was not part of the premises demised (*t*), is not an eviction. It is always a question of fact whether particular acts amount to an eviction or not (*u*). Eviction by title paramount is when the tenant is actually turned out by, or compelled unwillingly to attorn to, a person lawfully entitled to the premises (*x*); if the tenant goes out, or attorns by a voluntary arrangement, or pays rent, under a mere threat of distress, to another person (*y*), that is not an eviction (*z*). The eviction of an under-tenant is the eviction of the tenant (*a*).

### 8. *Vacant Possession.*

If the tenant has retained possession of the premises personally or by a sub-tenant or agent, the possession is not vacant (*b*). If the premises are unoccupied (*c*), pulled down (*d*), or locked up (*e*), and no person or goods are in them and the whereabouts of the tenant cannot be found (*f*), or he is dead (*g*), that amounts to vacant possession. Careful enquiries must first be made for the tenant, and

(*r*) *Hodgskin v. Queenborough*, Willes, 129; *Newby v. Sharpe*, 8 Ch. D. 39; *Paradine v. Jane*, Aleyn, 26; *Hunt v. Cope*, 1 Cowp. 242.

(*s*) *Wheeler v. Stevenson*, 6 H. & N. 155.

(*t*) *Williams v. Hayward*, 1 E. & E. 1040.

(*u*) *Upton v. Townsend*, 17 C. B. 30; *Henderson v. Mears*, 28 L. J. Q. B. 305.

(*x*) *Carpenter v. Parker*, 3 C. B. N. S. 206; *Poole v. Whitt*, 5 M. & W. 571.

(*y*) *Delaney v. Fox*, 2 C. B. N. S. 768.

(*z*) *Emery v. Barnett*, 4 C. B. N. S. 423.

(*a*) *Burn v. Phelps*, 1 Stark. 94.

(*b*) *Doe v. Roe*, 6 Dowl. 393; *Doe v. Roe*, 7 Dowl. 326; *Isaacs v. Diamond*, W. N. (1880) 75.

(*c*) *Doe v. Roe*, 7 C. B. 125; *Doe v. Roe*, 3 Dowl. 691.

(*d*) *Doe v. Roe*, 2 Dowl. 399, 428.

(*e*) *Doe v. Cock*, 4 B. & C. 259.

(*f*) *Doe v. Roe*, 1 D. & L. 657; *Doe v. Roe*, 2 Dowl. 399; *Doe v. Roe*, 12 L. J. Q. B. 97.

(*g*) *Doe v. Roe*, 2 Chit. 179.



the premises be searched, as if anything is left upon them, such as beer in a cellar or hay in a barn, they are not vacant (*h*).

#### 9. Assent of Executor to Bequest of Leaseholds.

The assent may be either express, or implied from acts and conduct (*i*); and whether it has been given or not is a question of fact in each case (*k*). A very small matter is sufficient evidence (*l*); if an executor does any act which shows his assent that is sufficient, but if his acts are referable to his character of executor they are not evidence of assent to the legacy (*m*). If an executor is given a life interest, his entry upon the premises is not of itself evidence of an assent, but, if he takes an absolute interest, it is (*n*); assent to a bequest for life is assent to a bequest in remainder (*n*); appointing a day for handing over the premises to the legatee (*o*), or paying the rent of the premises and charging it to the legatee, are evidence of assent (*p*).

#### 10. Sunrise and Sunset.

The almanack is not evidence as to the time of sunrise or sunset (*q*). It seems doubtful whether the time of sunrise is to be reckoned from the first appearance of the beams of the sun above the horizon, or when the entire sun has emerged, but "persons who distrain should bear

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| ( <i>h</i> ) <i>Savage v. Dent</i> , 2 Str. 1064.   | <i>Stevenson v. Liverpool</i> , L. R. 10        |
| ( <i>i</i> ) <i>Doe v. Sturges</i> , 7 Taunt.       | Q. B. 81.                                       |
| 217.  | ( <i>o</i> ) <i>Doe v. Guy</i> , 3 East, 120.   |
| ( <i>k</i> ) <i>Mason v. Farnell</i> , 12 M. &      | ( <i>p</i> ) <i>Doe v. Maberley</i> , 6 C. & P. |
| W. 674; <i>Elliott v. Elliott</i> , 9 M.            | 126; see also <i>Williams' Exors.</i>           |
| & W. 23.  | 1225—1239 (ed. 9).                              |
| ( <i>l</i> ) <i>Nosl v. Robinson</i> , 1 Vern.      | ( <i>q</i> ) <i>Tutton v. Darke</i> , 5 H. & N. |
| 90.   | 647; <i>Nixon v. Freeman</i> , 5 H. &           |
| ( <i>m</i> ) <i>Doe v. Sturges</i> , <i>supra</i> . | N. 652; <i>Collier v. Nokes</i> , 2 C. &        |
| ( <i>n</i> ) <i>Doe v. Sturges</i> , <i>supra</i> ; | K. 1012.  |

in mind that a distress is to be made in the daytime, and they ought not to go so near the limits as to raise any doubt on the subject" (r). The time of sunrise or sunset may be proved by an expert from an observatory.

### 11. *Authority of an Agent.*

An agent, when for instance he demands rent or gives a notice to quit, must be authorised at the time he acts (s); subsequent ratification of his act by his principal is sufficient if such ratification takes place before the time from which the act is to take effect (t). A general agent has a general authority (u), but the authority of a particular agent must be proved (u). An agent must notify his authority to the tenant, and if it is special must, if required, produce it (x). A notice given by a general agent need not show his agency upon its face (y). A corporation may appoint its agent to give notices or to do other ordinary acts without giving him an authority under seal (z).

### 12. *Elegit.*

*Elegit.*

An examined copy of the record in the action containing the judgment, the award of *elegit* and return of inquisition, is sufficient proof without proving the inquisition or the writ (a). If the record does not contain any memoran-

(r) *Tutton v. Darke*, *supra*;  
*Nixon v. Freeman*, *supra*.

(s) *Roe v. Davis*, 7 East, 363;  
*Jones v. Phipps*, L. R. 3 Q. B.  
567.

(t) *Doe v. Walker*, 14 L. J. Q. B.  
181; *Doe v. Walters*, 10 B. & C.  
626; *Doe v. Goldwin*, 2 Q. B.  
143; *Right v. Cuthell*, 5 East, 491.

(u) *Jones v. Phipps*, *supra*;  
*Doe v. Walker*, *supra*.

(x) *Roe v. Davies*, 7 East,  
763.

(y) *Jones v. Phipps*, L. R. 3 Q.  
B. 567; *Doe v. Walker*, 14 L. J.  
Q. B. 181.

(z) *Roe v. Pierce*, 2 Camp. 96;  
*Smith v. Birmingham Gas Co.*, 1  
A. & E. 526.

(a) *Ramsbottom v. Buckhurst*,  
2 M. & S. 565.

dum of the award of a writ, the writ itself can be produced (b).

### 13. *Copyholds.*

Customs of a manor, whether as to descent or other matters, can be proved by entries in Court Rolls, without proving any instance in which they have been acted upon (c); or by reputation of the custom (d); or by instances in which they have been acted upon (e). Examined copies of the Court Rolls, if proved to be true copies (f), or copies under the hand of the steward (g), can be used. Admittances and surrenders may be proved by entries in the Court Rolls, or by a certified copy thereof.

Customs.

Court rolls.

Admittances  
and sur-  
renders.

### 14. *Title of Parson.*

The presentation of a parson to the bishop, if by parol, may be proved by a person who was present and heard it (h). Presentation by a corporation aggregate must be in writing under the common seal and must be proved by proof of the seal. Institution is not of itself evidence of presentation, though the fact of presentation be recited in the letters of institution, especially if induction or possession has not followed. Institution may be proved by the letters testimonial of institution, or by the official entry in the public registry of the diocese, which ought regularly to record the time of institution, and on whose presentation it took place, such an entry being also evidence of

Presentation.

Institution.

(b) *Pack v. Tarpley*, 9 A. & E. 468.

(c) *Denn v. Spray*, 1 T. R. 466; *Roe v. Parker*, 5 T. R. 26, 32.

(d) *Doe v. Sisson*, 12 East, 62.

(e) *Doe v. Brightwen*, 10 East, 583.

(f) *Doe v. Cooke*, 5 Esp. 221; Scriven, 394.

(g) *Snow v. Cutler*, 1 Keb. 567; Scriven, 394.

(h) *R. v. Eriscell*, 3 T. R. 707, 723; B. N. P. 105; but see Phill. Eccl. Law, 407; Whitehead Church Law, 210.

## Induction.

presentation (*i*); or by other public records. Induction may be proved by a person who was present at the ceremony, or by an endorsement on the mandate directed by the ordinary to the archdeacon; or by the return to the mandate, if a return has been made (*k*). A parson need not prove that he has taken the requisite oaths, or declared his assent to the Book of Common Prayer according to the Act of Uniformity (*l*). Possession and enjoyment of the benefice is *prima facie* evidence of induction (*m*). Letters of institution reciting the cession of the parson's predecessor, followed by induction, are sufficient evidence of such cession (*n*). A parson need not prove the title of his patron (*o*).

15. *Title of Churchwardens.*

The fact that churchwardens have acted and are acting as such can be shown by the evidence of parishioners, or otherwise, and is of itself sufficient proof that they hold the office of churchwardens without proof of their appointment (*p*); though if there be an alleged custom to elect them at a select vestry, and they were so elected, evidence should be given of this custom (*q*).

16. *Will of Lands.*

## Contents.

The primary evidence of a will of lands is the will itself, and not the probate (*r*); if the will itself is lost, the ledger

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|---|--|
| ( <i>i</i> ) <i>R. v. Ely</i> , 8 B. & C. 112;  | 220; <i>Heath v. Pryn</i> , 1 Vent.            |
| Phill. Eccl. Law, p. 472.                       | 14.  |
| ( <i>k</i> ) Phill. Eccl. Law, p. 477.          | ( <i>p</i> ) <i>Doe v. Barnes</i> , 8 Q. B.    |
| ( <i>l</i> ) <i>Powel v. Milbank</i> , 2 Will.  | 1037.  |
| Blac. 851.                                      | ( <i>q</i> ) <i>Berry v. Banner</i> , 1 Peake, |
| ( <i>m</i> ) <i>Chapman v. Beard</i> , 3 Anstr. | 212.   |
| 942.  | ( <i>r</i> ) <i>Doe v. Calvert</i> , 2 Camp.   |
| ( <i>n</i> ) <i>Doe v. Carter</i> , Ry. & M.    | 387; <i>Sly v. Sly</i> , 2 P. D. 91;           |
| 237.  | Roscoe, N. P. p. 143 (ed. 16).                 |
| ( <i>o</i> ) <i>Snow v. Phillips</i> , 1 Sid.   |  |

or register book of the Ecclesiastical Court, or an examined or office copy or any authenticated copy, have been admitted as secondary evidence; parol evidence of the contents of a lost or destroyed will is also admissible (s). The due execution of a will may be proved by one of the attesting witnesses (t); if one or all of them cannot recollect whether the will was properly executed, or swear that it was not, evidence may be given to show that it was properly executed (u). Due execution may be presumed if the usual form of attestation has been used, or may be found as a fact when the signature of the witnesses has been proved (x). If the witnesses are dead, this fact and their handwriting should be proved (y). If any one of the attesting witnesses can prove the due execution he must be called (z). A will thirty years old coming from the proper custody will, like a deed, be presumed to have been duly executed (a). Formerly the thirty years were reckoned from the date when the will was executed (b), but whether that is so since the Wills Act, or whether the

Execution.

Will 30  
years old.

(s) *Doe v. Calvert*, 2 Camp. 390, note; *Brown v. Brown*, 8 E. & B. 876; *Sugden v. St. Leonard's*, 1 P. D. 154; see *Woodward v. Goulstone*, 11 App. Cas. 469.

(t) *Longford v. Eyre*, 1 P. Wms. 740; *Belbin v. Skeats*, 1 Swa. & Tr. 148; *Wright v. Tatham*, 1 A. & E. 3; B. N. P. 264.

(u) *Lowe v. Jolliffe*, 1 W. Blac. 365; *Wright v. Rogers*, L. R. 1 P. & M. 678; *Croft v. Croft*, 4 Swa. & Tr. 10.

(x) *Woodhouse v. Balfour*, 13 P. D. 2; *Doe v. Daviss*, 9 Q. B. 648; *Wright v. Rogers*, *supra*;

*Buller v. Burt*, cited 4 A. & E. 15; *Doe v. Burdett*, 4 A. & E. 1; *Croft v. Pawlett*, 2 Stra. 1109; see *Wright v. Sanderson*, 9 P. D. 149.

(y) *Andrew v. Motley*, 12 C. B. N. S. 527, 532.

(z) *Owen v. Williams*, 32 L. J. P. M. & A. 159; *Coles v. Coles*, L. R. 1 P. & M. 70; *Bowman v. Hodgson*, L. R. 1 P. & M. 362.

(a) *Doe v. Burdett*, 4 A. & E. 1; *Andrews v. Motley*, *supra*; *Doe v. Michael*, 17 Q. B. 276.

(b) *Doe v. Wolley*, 8 B. & C. 22.

time is to be reckoned from the death of the testator, is doubtful (c).

When probate  
is evidence.

When a will of lands has been proved in solemn form, or when its validity has been declared by a decree or order in a contentious cause or matter, the probate, decree, or order are conclusive evidence of its validity and contents (d), except as against the heir, or any person in respect of his interest in the land, if he has not been cited or made a party to the proceedings, unless he derives title under or through a person who has been cited or made a party (e). If it is necessary to prove the original will, a party may give ten days' notice of his intention to give in evidence the probate of such will, and the probate will be sufficient evidence of its validity and contents unless the party receiving the notice gives, within four days of its receipt, a counter-notice disputing its validity (f). "Sufficient evidence" means only good *prima facie* evidence, and the validity may be disputed though counter-notice has not been given (g). A notice under this section ought to be given to the solicitor, and not merely to the party (h).

Will of  
leaseholds.

The probate granted by the proper court is the proper evidence of a will of personalty, *e.g.*, leaseholds, secondary evidence being admissible when necessary (i).

### 17. Heirship.

Heirship may be proved by direct and express evidence, or, if this cannot be done, by reasonable evidence that no nearer heir can be found after due enquiries for nearer

(c) See Roscoe, N. P. 148 (ed. 16); *Langdale v. Briggs*, 8 De G. M. & G. 391, 436.

(d) 20 & 21 Vict. c. 77, s. 62.

(e) *Id.* s. 63.

(f) *Id.* s. 64.

(g) *Barraclough v. Greenhough*, L. R. 2 Q. B. 612.

(h) *Barraclough v. Greenhough*, *supra*.

(i) Roscoe, N. P. p. 143 (ed. 16).

heirs have been made, by advertisement or otherwise, and that there has been no claim made by descendants of those who were in existence at a remote period (*k*).

Births and the time thereof, marriages, deaths, and consanguinity generally, may be proved by hearsay, from proper quarters, in pedigree cases (*l*); or by direct evidence of eye-witnesses (*m*).

Births,  
marriages,  
and deaths;  
consan-  
guinity.

Death may be proved by entries in the register, or certified or examined copies thereof (*n*), coupled with some evidence of identity (*o*). The receipt of a legacy under a will purporting to be made by the deceased is evidence of death (*p*), but probate or letters of administration are not (*q*).

Death.

Births, deaths, and marriages of British officers and soldiers, out of the United Kingdom, are proved by Army Register Books (*r*). Births and deaths on board ship are proved by entries in the Marine Register Book (*s*). Marriages on board ship are proved by entries in the log-book, in cases where official log-books are required (*t*).

Abroad, or  
on ship.

Where a person has not been heard of for seven years it is presumed that such person is dead, but not that he died at any particular period within the seven years; the

Absence for  
seven years.

(*k*) *Greaves v. Greenwood*, 2 Ex. D. 289; *Richards v. Richards*, 15 East, 294.

(*l*) *Shields v. Boucher*, 1 De G. & S. 40; *Re Lambert*, 56 L. J. Ch. 122; *Haines v. Guthrie*, 13 Q. B. D. 818; *Re Thompson*, 12 P. D. 100; *Palmer v. Palmer*, 18 L. R. Ir. 192.

(*m*) *Limerick v. Limerick*, 32 L. J. P. & M. 92; *Bain v. Mason*, 1 C. & P. 202; *R. v. Allison*, R. & R. 109.

(*n*) *Roscoe*, N. P. 124 (ed. 16).

(*o*) *Doe v. Griffin*, 15 East, 293; *Parkinson v. Francis*, 15 Sim. 160.

(*p*) *Doe v. Penfold*, 8 C. & P. 536.

(*q*) *Thompson v. Donaldson*, 3 Esp. 63; *Moons v. de Bernales*, 1 Russ. 301; but see *French v. French*, 1 Dick. 268; *Reilly v. Fitzgerald*, 6 Ir. Eq. Rep. 335, 349.

(*r*) 42 & 43 Vict. c. 8.

(*s*) 37 & 38 Vict. c. 88, s. 37.

(*t*) 17 & 18 Vict. c. 104, s. 282.

onus of proving death at any particular time within the seven years lies upon the person alleging the death at a particular time (*u*). A person alive at any particular time is presumed to have been alive at any reasonable time afterwards (*x*).

**Survivorship.** There is no presumption of survivorship between persons who meet their death by the same cause, whatever their ages or sex, but survivorship must be proved by direct evidence (*y*).

**Death without issue.** Death without issue will be presumed after the lapse of a long period where there is no evidence to the contrary, such as the marriage of the deceased (*z*).

**Marriages.** Marriages and the time and place thereof can be proved by entries in the register (*a*), or by certified or examined copies (*a*), and by declarations of the parties themselves (*b*), and of others who know the fact (*c*), or by general reputation (*d*). The identity of the persons must be proved, and this may be done by proving their handwriting (*e*). The fact of birth may be proved by entries in the register of births or

(*u*) *Doe v. Nepean*, 5 B. & Ad. 86; 2 Sm. L. C. pp. 610, 729 (ed. 9); *Re Phen's Trusts*, 5 Ch. 139, 148; *Re Corbishley*, 14 Ch. D. 846; *Re Lewes*, 11 Eq. 236; 6 Ch. 356; *Re Bearney*, 7 Eq. 498; *Re Benham's Trusts*, 4 Eq. 416, 419; *Hickman v. Upsall*, 20 Eq. 136; 4 Ch. D. 144; *Prudential Co. v. Edmonds*, 2 App. Cas. 487; *Rhodes v. Rhodes*, 36 Ch. D. 586.

(*x*) *Re Phen's Trusts*, *supra*; *Pearson v. A.-G.*, 53 L. T. 707, 710.

(*y*) *Mason v. Mason*, 1 Mer. 308, 312; *Underwood v. Wing*, 4 De G. M. & G. 633; *Wing v. Angrave*, 8 H. L. C. 183; *Re*

*Alston*, [1892] Prob. p. 142.

(*z*) *Doe v. Wolley*, 8 B. & C. 22, 27; *Doe v. Griffin*, 15 East, 293; *Greaves v. Greenwood*, 2 Ex. D. 289.

(*a*) 6 & 7 Will. 4, c. 85; *id.* c. 86, s. 38; 1 Vict. c. 22; *Sayer v. Glossop*, 2 Exch. 409; *Doe v. Andrews*, 15 Q. B. 756; *Doe v. Barnes*, 1 M. & Rob. 386.

(*b*) B. N. P. 112.

(*c*) *Shedden v. A.-G.*, 30 L. J. P. & M. 217.

(*d*) S. C.; *Campbell v. Campbell*, L. R. 1 H. L. Sc. 201.

(*e*) *Birt v. Barlow*, 1 Doug. 170; *Bain v. Mason*, 1 C. & P. 202; *Sayer v. Glossop*, *supra*; *R. v. Tolson*, 4 F. & F. 103.



baptisms (*f*) or by certified or examined copies thereof (*g*), or by declarations of the parents (*h*). The time may be proved by memoranda of the parents (*i*). Entries in the registers of births or baptisms as to the time or place of birth are admissible in pedigree cases as an item of evidence, though little weight will be given to such entries if uncorroborated (*k*). They are, however, good evidence that the birth took place before the registration (*l*).

It must be shown that entries in registers have been made by a person upon whom a public duty was imposed to make such entries, or whose duty it was to complete a transaction and to make an entry of it when completed (*m*). In all cases where certified or examined copies of registers are used it must be shown that the register is in its proper custody (*n*).

Entries in registers.

The general rule is that a child born in wedlock is presumed to be the child of the husband and to be legitimate (*o*). This presumption may be rebutted by evidence, which must be clear and conclusive, and not resting merely on a balance of probabilities, and must be such as to establish in the minds of a jury the conviction that the child

Legitimacy.

- (*f*) 14 & 15 Vict. c. 99, s. 14 ; *R. v. Weaver*, L. R. 2 C. C. R. 85.  
 (*g*) 52 Geo. 3, c. 146, s. 5, s. 6 ; *B. N.* p. 247.  
 (*h*) *Re Thompson*, 12 P. D. 100.  
 (*i*) *Roe v. Rawlings*, 7 East, 279, 290 ; *Re Turner*, 29 Ch. D. 985.  
 (*k*) *Re Turner*, *supra* ; see *Doe v. Bray*, 8 B. & C. 813.  
 (*l*) *Re Wintle*, 9 Eq. 373 ; *R. v. North Petheram*, 5 B. & C. 508.  
 (*m*) *Lyell v. Kennedy*, 56 L. T. 647 ; *Doe v. Andrews*, 15 Q. B. 756, 758 ; *Ryan v. King*, 25 L. R. Ir. 184.  
 (*n*) 14 & 15 Vict. c. 99, s. 14 ; *R. v. Weaver*, L. R. 2 C. C. R. 85.  
 (*o*) *Morris v. Davies*, 5 Cl. & F. 163 ; *Bosvile v. A.-G.*, 12 P. D. 177 ; *Hawes v. Draeger*, 23 Ch. D. 173 ; *Legge v. Edmonds*, 25 L. J. Ch. 125 ; *Plowes v. Bossey*, 31 L. J. Ch. 681 ; *Gardner v. Gardner*, 2 App. Cas. 723 ; *Banbury Peerage case*, 1 S. & St. 153 ; *Hargrave v. Hargrave*, 9 Beav. 552 ; *Atchley v. Sprigg*, 33 L. J. Ch. 345 ; *Aylesford Peerage*, 11 App. Cas. 1.

was illegitimate (o). The onus of proving the illegitimacy of a child born in wedlock lies upon the person asserting it (p). The presumption of legitimacy may be rebutted by evidence of non-access from want of opportunity (q), or of circumstances from which non-access may be inferred (r), such as adultery (s), concealment of the fact of pregnancy or of the birth of the child (t), the child taking the paramour's name (u), recognition of the child as his own by the paramour (x), reputation of illegitimacy in the family (y), though not a general reputation of it (z), the incapacity of the husband (a), or that the child was begotten after a judicial separation (b). Neither the husband nor wife can prove non-access (c); nor are their declarations admissible to bastardize their child (d), but they may be admis-

(o) See note, preceding page.

(p) *Plowes v. Bossey*, 31 L. J. Ch. 681; *Banbury Peerage case*, 1 S. & St. 153; *Gardner v. Gardner*, 2 App. Cas. 723.

(q) *Saye and Sele*, 1 H. L. C. 507, 512; *R. v. Luffe*, 8 East, 193; *Hargrave v. Hargrave*, 9 Beav. 552.

(r) *Bosville v. A.-G.*, 12 P. D. 177; *Morris v. Davies*, 5 Cl. & F. 163; *Hawes v. Draeger*, 23 Ch. D. 173; *R. v. Mansfield*, 1 Q. B. 444; *Plowes v. Bossey*, *supra*.

(s) *Cope v. Cope*, 1 M. & Rob. 269; *R. v. Mansfield*, 1 Q. B. 444; *Morris v. Davies*, 5 Cl. & F. 163; *Saye and Sele*, 1 H. L. C. 507.

(t) *Morris v. Davies*, *supra*; *Bosville v. A.-G.*, 12 P. D. 177.

(u) *Hawes v. Draeger*, 23 Ch. D. 173; *Atchley v. Sprigg*, 33 L. J. Ch. 345; *Goodright v. Saul*, 4 T.

R. 356.

(x) *Morris v. Davies*, *supra*.

(y) *Goodright v. Saul*, *supra*.

(z) *Glenister v. Harding*, 29 Ch. D. 985, 991.

(a) *Hargrave v. Hargrave*, 9 Beav. 552; *Legge v. Edmonds*, 25 L. J. Ch. 125.

(b) *St. George's and St. Margaret's*, 1 Salk. 123; 1 Taylor on Evidence, p. 129 (8th ed.).

(c) *R. v. Sourton*, 5 A. & E. 180; *Cope v. Cope*, 1 M. & Rob. 269; *Nottingham (Guardians) v. Tomkinson*, 4 C. P. D. 343; *Hamp v. Robinson*, 16 L. T. 29; *Atchley v. Sprigg*, 33 L. J. Ch. 345; *Burnaby v. Baillie*, 61 L. T. 634; *Hawes v. Draeger*, 23 Ch. D. 173, 178.

(d) *Cope v. Cope*, *supra*; *Legge v. Edmonds*, 25 L. J. Ch. 125; *Atchley v. Sprigg*, 33 L. J. Ch. 345.

sible as evidence of conduct to establish adultery (*e*) or to prove the paternity of the child if non-access is established *aliunde* (*f*). Declarations by a parent that the marriage was invalid (*g*), or that there was no marriage, or that the child was born before marriage, are admissible after the parent's death (*h*); a child's declarations as to its own illegitimacy are not admissible except as against itself (*i*). Illegitimacy may also be shown by entries in family bibles (*k*), or parish registers (*l*).

Declarations whether oral or written may be given in evidence for the purpose of proving the existence of relationship between members of a family (*m*), or that a certain person was or was not a relation of a family (*m*), or the place where a person resided (*n*); they must be of matters within the declarant's own personal knowledge (*o*), or which he has heard from persons to whose statements he gave credit (*o*); the declarant, and any person whose statement he has repeated, must be shown by evidence dehors his declaration to be a blood relation of the family to which his declaration refers (*p*), or the husband, wife, or

Hearsay  
to prove  
relationship.

(*e*) *The Aylesford Peerage*, 11 App. Cas. 1.

(*f*) *Legge v. Edmonds*, *supra*.

(*g*) *R. v. Bramley*, 6 T. R. 330; *Murray v. Milner*, 12 Ch. D. 845.

(*h*) *Murray v. Milner*, *supra*; *Goodright v. Moss*, 2 Cowp. 591.

(*i*) *R. v. Rishworth*, 2 Q. B. 476.

(*k*) *Berkeley Peerage case*, 4 Camp. 401.

(*l*) *Cope v. Cope*, 1 M. & Rob. 280; *Glenister v. Harding*, 29 Ch. D. 985, 991.

(*m*) *Monkton v. A.-G.*, 2 R. & My. 247; *Pearson v. A.-G.*, 53 L. T. 707, 709; *Haines v. Guthrie*,

13 Q. B. D. 818.

(*n*) *Rishton v. Nesbitt*, 2 M. & Rob. 554.

(*o*) *Monkton v. A.-G.*, *supra*; *Davies v. Lowndes*, 6 M. & G. 471, 527; *Shields v. Boucher*, 1 De G. & S. 40; *The Lauderdale Peerage*, 10 App. Cas. 692, 706; *The Lovat Peerage*, 10 App. Cas. 763.

(*p*) *Vowles v. Young*, 13 Ves. 140, 147; *Doe v. Davies*, 16 L. J. Q. B. 218; *Monkton v. A.-G.*, *supra*; *Smith v. Tebbitt*, L. R. 1 P. & D. 354; *The Shrewsbury Peerage*, 7 H. L. C. 1, 26; *Pearson v. A.-G.*, 53 L. T. 707, 709.

mother of a member thereof (*q*). The declarations must have been made before the controversy to which they are material arose (*r*), but may have been made with a view to any such controversy if and when it should arise (*s*); the declarant must be dead (*t*).

Declarations may be contemporaneous entries in family bibles (*u*), or books (*x*); in letters or memoranda (*y*); in inscriptions on monuments (*z*), walls (*a*), tombs (*b*), pictures (*c*), hatchments (*d*), or rings (*e*); in recitals or statements in deeds (*f*), settlements (*g*), wills (*h*), drafts (*i*), or pedigrees produced from the custody of a family relation (*k*).

Marriage  
law.

The general rule is that the law of the country where the marriage is solemnized decides all questions relating

(*q*) *Doe v. Harvey*, R. & Moo. 297; *The Aylesford Peerage*, 11 App. Cas. 1.

(*r*) *Monkton v. A.-G.*, *supra*; *Smith v. Tebbitt*, *supra*; *Walker v. Beauchamp*, 6 C. & P. 552; *Lowat Peerage*, 10 App. Cas. 763; *Shedden v. A.-G.*, 30 L. J. P. & M. 217.

(*s*) *Monkton v. A.-G.*, *supra*; *Davies v. Lowndes*, 6 M. & G. 527; *Lauderdale Peerage*, 10 App. Cas. 692; *Berkeley Peerage*, 4 Camp. 401.

(*t*) *Smith v. Tebbitt*, *supra*; *Pendrell v. Pendrell*, 2 Str. 924; *Johnson v. Lawson*, 2 Bing. 86; *Butler v. Mountgarret*, 7 H. L. C. 633, 648.

(*u*) *Monkton v. A.-G.*, *supra*; *Berkeley Peerage*, 4 Camp. 401, 416; *Hubbard v. Lees*, L. R. 1 Ex. 255.

(*x*) *Neal v. Wilding*, 2 Str. 1151; *Doe v. Bray*, 8 B. & C. 813; *May v. May*, 2 Str. 1073.

(*y*) *Butler v. Mountgarret*, 7 H. L. C. 633, 648; *Re Turner*, 29 Ch. D. 985.

(*z*) *Kidney v. Cockburn*, 2 R. & My. 167.

(*a*) *Slaney v. Wade*, 1 My. & C. 338.

(*b*) *Monkton v. A.-G.*, *supra*; *Vowles v. Young*, 13 Ves. 140.

(*c*) *Camoy's Peerage*, 6 Cl. & F. 789.

(*d*) *Hungate v. Gascoigne*, 2 Coop. 405, 407, 414.

(*e*) *Vowles v. Young*, *supra*; *Monkton v. A.-G.*, *supra*.

(*f*) *Smith v. Tebbitt*, L. R. 1 P. & D. 354.

(*g*) *De Roos Peerage*, 2 Coop. 541.

(*h*) *Doe v. Pembroke*, 11 East, 504.

(*i*) *Re Lambert*, 56 L. J. Ch. 122.

(*k*) *Camoy's Peerage*, 6 Cl. & F. 789.

to the validity of the ceremony by which the marriage is alleged to have been constituted, but the law of the domicile of the parties decides the personal capacity to contract a valid marriage (*l*).

### 18. *Deeds and Documents.*

A document in writing which does not require attestation may be proved by admission or otherwise without calling the attesting witness if there be one (*m*). If attestation is necessary, one of the attesting witnesses must be called (*n*); and if this be impossible, as for instance if the only witness is insane (*o*), or dead (*p*), not merely ill (*q*), or out of the jurisdiction of the Court (*r*), or cannot be found (*s*), his handwriting may be proved; if he be blind he must be called (*t*). Proof of attestation.

Where the attesting witness asserts that the instrument was never executed (*u*), or that he never saw it executed (*x*), or that he signed his name without being desired to do so (*y*), or if the name of a fictitious person is added as a witness (*z*), then evidence should be given to prove

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| ( <i>l</i> ) <i>Sottomayor v. De Barros</i> , 3 P. D. 1.                                  | East, 250.   |
| ( <i>m</i> ) 17 & 18 Vict. c. 125, s. 26;   | ( <i>s</i> ) <i>Cumliffe v. Sefton</i> , 2 East,   |
| <i>Whyman v. Garth</i> , 8 Exch. 803;   | 183; <i>Spooner v. Payne</i> , 4 C. B.   |
| <i>Bowman v. Hodgson</i> , L. R. 1 P. & D. 362.   | 328; <i>Crosby v. Percy</i> , 1 Taunt. 364.  |
| ( <i>n</i> ) <i>Gillies v. Smither</i> , 2 Stark. 528; <i>Breton v. Cope</i> , Peake, 43; | ( <i>t</i> ) <i>Cronk v. Frith</i> , 9 C. & P. 197; <i>Pedler v. Paige</i> , 1 M. & Rob. 258.  |
| <i>Bowman v. Hodgson</i> , <i>supra</i> .   | ( <i>u</i> ) <i>Bowman v. Hodgson</i> , L. R. 1 P. & D. 362.                                   |
| ( <i>o</i> ) <i>Currie v. Child</i> , 3 Camp. 283; <i>Bernett v. Taylor</i> , 9 Ves. 381. | ( <i>x</i> ) <i>Talbot v. Hodson</i> , 7 Taunt. 251; <i>Fitzgerald v. Elsee</i> , 2 Camp. 635. |
| ( <i>p</i> ) <i>Adam v. Kerr</i> , 1 Bos. & P. 360.                                       | ( <i>y</i> ) <i>McCraw v. Gentry</i> , 3 Camp. 232.  |
| ( <i>q</i> ) <i>Harrison v. Blades</i> , 3 Camp. 457.                                     | ( <i>z</i> ) <i>Fasset v. Brown</i> , 1 Peake, 23.   |
| ( <i>r</i> ) <i>Barnes v. Trompowsky</i> , 7 T. R. 265; <i>Prince v. Blackburn</i> , 2    |  |

the document by other means, such as the handwriting of the party executing it (*a*).

If a witness called to prove attestation can say on seeing his own signature that he is satisfied the document was executed, this is sufficient, though the witness do not recollect the fact of the execution (*b*).

Execution.  
Deed 30  
years old.

No evidence of execution or attestation is necessary when a deed is thirty years old and is produced from proper custody (*c*); or where a deed is admitted (*d*), or is produced by a party claiming an interest under it connected with the cause (*e*); though if no interest under it (*f*), or an interest not connected with the cause (*g*), be claimed, the deed must be proved in the ordinary way; or where the deed is in the possession of the adversary who refuses to produce it (*h*); or is lost, and the attesting witness is dead (*i*).

Signature.

Signature is not necessary for a deed, but is evidence of sealing and delivery (*k*) if the deed purports to be sealed and delivered, and it may be proved by evidence of handwriting (*l*) or, in case of a marksman, of the mark; and

(*a*) *Fitzgerald v. Elsee*, 2 Camp. 635; *Grellier v. Neale*, 1 Peake, 146.

(*b*) *Maugham v. Hubbard*, 8 B. & C. 14; *R. v. St. Martin's*, 2 A. & E. 210, 213.

(*c*) *Doe v. Samples*, 8 A. & E. 151; *Doe v. Wolley*, 8 B. & C. 22; *Doe v. Burdett*, 4 A. & E. 1; *Meath v. Winchester*, 3 B. N. C. 183.

(*d*) *Bringloe v. Goodson*, 5 B. N. C. 738; *Fishmongers Co. v. Dimsdale*, 6 C. B. 896; *Freeman v. Steggall*, 14 Q. B. 202.

(*e*) *Pearce v. Hooper*, 3 Taunt. 60.

(*f*) *Gordon v. Secretan*, 8 East, 548.

(*g*) *Rearden v. Minter*, 5 M. & Gr. 204.

(*h*) *Cooke v. Tanswell*, 8 Taunt. 450; *Poole v. Warren*, 8 A. & E. 582.

(*i*) *R. v. St. Giles*, 22 L. J. M. C. 54.

(*k*) *Cherry v. Heming*, 4 Ex. 631; *Roscoe*, N. P. p. 135, 137 (ed. 16).

(*l*) *Fitzgerald v. Elsee*, 2 Camp. 635; *Grellier v. Neale*, 1 Peake, 146; *Doe v. Suckermore*, 5 A. & E. 703.

if signature is proved, sealing and delivery will be presumed (*m*).

The question whether or not a deed has been sealed is one of fact and intention ; neither wax nor wafer need be used (*n*), but there should be some impression of a seal on the deed (*n*) ; if the deed is stated to have been signed, sealed and delivered in the presence of witnesses, sealing will probably be presumed, unless there is evidence to the contrary (*o*) ; several persons may use the same seal unless the deed is required to be under the hands and seals of the parties (*p*).

A corporation may adopt any seal, provided the use of it is a corporate act (*q*). A corporation deed, if signed or sealed as directed by any Act, is admissible in evidence without proof of the seal, stamp, or signature (*r*). The seal of the City of London proves itself (*s*).

No particular mode of delivery of a deed is necessary, and if the deed be properly executed delivery will be presumed (*t*). Fixing the common seal to a corporation deed amounts also to a delivery (*u*).

If the delivery of a deed is not intended to be absolute, but the deed is only to take effect on a specified event (*x*) or condition (*y*), then the deed is merely an escrow until

(*m*) *Grellier v. Neale*, 1 Peake, 146.

(*n*) *R. v. St. Paul's*, 7 Q. B. 232 ; *Nat. Prov. Bank v. Jackson*, 33 Ch. D. 1 ; *Re Balkis*, 58 L. T. 300 ; see *Re Sandilands*, L. R. 6 C. P. 411 ; 1 Sugd. Powers, ch. 7, sec. 4 (9) (ed. 8).

(*o*) *Re Sandilands, supra*.

(*p*) *Ball v. Dunsterville*, 4 T. R. 313 ; *Hall v. Bainbridge*, 12 Q. B. 699.

(*q*) *Jones v. Galway*, 11 Ir. L. R. 435.

(*r*) 8 & 9 Vict. c. 113, s. 1 ; see *Moises v. Thornton*, 8 T. R. 303 ; *Doe v. Chambers*, 4 A. & E. 410.

(*s*) *Doe v. Mason*, 1 Esp. 53.

(*t*) *Ball v. Dunsterville*, 4 T. R. 313 ; *Hall v. Bainbridge*, 12 Q. B. 699.

(*u*) Com. Dig. Fait. (A. 3).

(*x*) *Kidner v. Keith*, 15 C. B. N. S. 35 ; *Shep. Touch.* 59.

(*y*) *Bowker v. Burdekin*, 11 M. & W. 128 ; *Johnson v. Baker*, 4 B. & Ald. 440.

Sealing.

Corporation  
deeds.  
Deed of  
corporation.

Delivery.

Escrow.

the happening of the event or fulfilment of the condition ; and if the deed is afterwards found with the person in whose favour it is made, this is evidence that the event has happened or the condition been fulfilled (*z*). If the intention to deliver the deed as an escrow is clear, no express words need be used, nor need the deed be delivered to a third person (*a*) ; nor will the mere delivery of the deed to a third person for the use of the person in whose favour it is made necessarily make it an escrow, for it is always a question of intention (*b*).

Proof of  
contents of  
documents.

The contents of deeds and documents are proved by production of the original (*c*), by counterparts (*d*), by duplicate originals (*e*), and by secondary evidence, such as examined, or certified copies (*f*), when the non-production of the primary evidence is properly explained (*g*). Secondary evidence is admissible when the original is with the opposite party, who refuses to produce it after notice (*h*) ; or where it is lost or destroyed (*i*) ; or cannot be moved or easily procured (*k*) ; or consists of numerous documents not easily examined in Court (*l*) ; or is in the hands of a stranger who is not legally bound to produce it and refuses to do so (*m*).

Secondary  
evidence.

(*z*) *Hare v. Horton*, 5 B. & Ad. 715. & Rob. 366.

(*a*) *Gudgen v. Besset*, 6 E. & B. 986 ; *Murray v. Stair*, 2 B. & C. 82.

(*b*) *Doe v. Knight*, 5 B. & C. 671 ; *Exton v. Scott*, 6 Sim. 31 ; *Watkins v. Nash*, 20 Eq. 262.

(*c*) Stephen's Ev. p. 72 (ed. 1893).

(*d*) *Munn v. Godbold*, 3 Bing. 292 ; *Roe v. Davis*, 7 East, 363.

(*e*) *R. v. Watson*, 2 Stark. 150.

(*f*) *Munn v. Godbold*, *supra*.

(*g*) *Harvey v. Mitchell*, 2 M.

(*h*) *Cooke v. Tanswell*, 8 Taunt. 450 ; *Poole v. Warren*, 8 A. & E. 582 ; *Dwyer v. Collins*, 7 Exch. 639, 647.

(*i*) *Doe v. Wittcomb*, 6 Exch. 601.

(*k*) *Doe v. Cole*, 6 C. & P. 359 ; *Mortimer v. McCallan*, 6 M. & W. 58 ; Tayl. Ev. I. p. 404 (ed. 8).

(*l*) *Roberts v. Doxon*, 1 Peake, 116 ; *Meyer v. Sefton*, 2 Stark. 274.

(*m*) *Marston v. Downes*, 1 A. &



If the document is in the hands of the opposite party, notice to produce must be given. Such notice is not required if the opposite party has got possession of the document by fraud from the person subpoenaed to produce (*n*), or when from the nature of the suit he must know he is charged with the possession of it (*o*), or when he has it in Court (*p*), or its non-existence is admitted (*q*). If the document is in the hands of a stranger he must be subpoenaed to produce it (*r*), unless he has it in Court (*s*); but a wrongful refusal to produce it after subpoena does not entitle the party to give secondary evidence (*t*).

Notice to  
produce, or  
subpoena  
duces tecum.

### 19. Award.

To prove an award, the submission and the due execution of the award must be proved, and also the appointment of the arbitrators if they are not named in the submission. If the submission is by judge's order, an office copy of the order is sufficient proof of the submission (*u*), but in other cases the submission must be proved like any other contract (*x*). If the time for making the award has been enlarged, and the award made within the enlarged time, it must be shown that the time was properly enlarged (*y*), or that the irregularity has been waived if the

E. 31; *Mills v. Oddy*, 6 C. & P. 728; *Newton v. Chaplin*, 10 C. B. 356, 368; see *Bursill v. Tanner*, 16 Q. B. D. 1.

(*n*) *Leeds v. Cook*, 4 Esp. 256.

(*o*) *How v. Hall*, 14 East, 274; *Colling v. Treweek*, 6 B. & C. 394, 398.

(*p*) *Dwyer v. Collins*, 7 Exch. 639.

(*q*) *R. v. Haworth*, 4 C. & P. 254; *Foster v. Pointer*, 9 C. & P. 718.

(*r*) *Newton v. Chaplin*, 10 C. B. 356.

(*s*) *Mills v. Oddy*, 6 C. & P. 728; *Marston v. Downes*, 1 A. & E. 31; *Doe v. Clifford*, 2 C. & K. 448; *Newton v. Chaplin*, *supra*.

(*t*) *R. v. Llanfaethly*, 2 E. & B. 940.

(*u*) *Berney v. Read*, 7 Q. B. 79; *Still v. Halford*, 4 Camp. 17.

(*x*) *Berney v. Read*, *supra*; *Ferrer v. Owen*, 7 B. & C. 427; *Brazier v. Jones*, 8 B. & C. 124.

(*y*) *Davis v. Vass*, 15 East, 97; see Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 9.

time was not properly enlarged (z). If the performance of any conditions precedent is denied, such performance must be proved.

Awards under  
Inclosure  
Acts.

Awards under Inclosure Acts are proved by production of the original award, or true copies signed by the proper officer or by the clerk of the peace or his deputy (a) ; and such awards are presumed to have been regularly made, and all necessary formalities to have been completed, though this presumption may be rebutted (b). Awards under 6 & 7 Will. 4, c. 115, or 3 & 4 Vict. c. 31, are now conclusive evidence of all necessary consents, and no other evidence of title is necessary (c).

(z) *Re Hick*, 8 Taunt. 694 ; S. 558 ; *Doe v. Gore*, 2 M. & W. Tyerman v. Smith, 6 E. & B. 719. 320 ; *Williams v. Eyton*, 2 H. &

(a) 41 Geo. 3, c. 109, s. 35 ; 3 N. 771 ; see *Wingfield v. Tharp*, & 4 Will. 4, c. 87, ss. 2, 4. 10 B. & C. 785.

(b) *R. v. Haslingfield*, 2 M. & (c) 3 & 4 Vict. c. 31, s. 1.

## CHAPTER XXII.

### PRACTICE IN THE HIGH COURT.

IN this chapter it is proposed to deal with the procedure in the High Court in an action of ejectment, but merely as to those points in which the procedure in such an action differs from that in an ordinary action (*a*).

In all actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or against persons claiming under such tenant, the writ of summons may at the option of the plaintiff be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled; such special indorsement shall be to the effect of such of the forms in Appendix C, sect. 4, as shall be applicable to the case (*b*).

Ord. III. r. 6.  
Special indorsement.

This rule only applies when the plaintiff is either the original lessor, or is an assignee whose title has been acknowledged by the tenant (*c*); and when the tenancy has expired by effluxion of time, or has been determined by notice to quit (*d*). It does not apply when the tenancy has been determined by a forfeiture (*e*) or by surrender (*ee*).

(*a*) Chit. Arch. vol. ii. p. 1206 (ed. 14).

(*b*) App. A, p. 288.

(*c*) *Casey v. Hellier*, 17 Q. B. D. 97. What is such acknowledgment, *vide* p. 26, 29.

(*d*) *Doe v. Roe*, 1 D. & R. 540.

(*e*) *Mansergh v. Rimell*, W. N. 1884, p. 34; *Burns v. Walford*, W. N. 1884, p. 31; *Arden v. Boyce*, [1894] 1 Q. B. 796.

(*ee*) *Doe v. Roe*, 2 B. & Ad. 922.

Where it was provided in a lease that, upon non-payment of rent, the landlord might forthwith give the tenant notice to quit in writing, and such notice to quit was given, it was held that the case was not within the rule (f). A mortgagee, to whom the mortgagor has attorned tenant, is a landlord within this rule (g).

Ord. IX. r. 9. Service of a writ of summons in an action to recover land may, in case of vacant possession, when it cannot otherwise be effected, be made by posting a copy of the writ upon the door of the dwelling-house, or other conspicuous part of the property.

Ord. IX. r. 2. When service is required the writ shall, wherever it is practicable, be served in the manner in which personal service is now made, but if it be made to appear to the Court or a judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or judge may make such order for substituted or other service or for the substitution for service of notice, by advertisement or otherwise as may be just.

Substituted service. If practicable, personal service must be effected; if not practicable, and if there is not vacant possession, an order for substituted service may be obtained. If there is vacant possession, and service cannot otherwise be effected, a copy of the writ may be posted on the property. Personal service is effected by tendering a copy of the writ to the defendant, and producing the original if required. Substituted service may be in such manner as the Court or judge directs by the order giving leave (h). Possession is vacant when the premises have been really abandoned and the last tenant does not intend to return (i). Judgment

(f) *Arden v. Boyce*, [1894] 1 Q. B. 796. (h) *Crane v. Jullion*, 2 Ch. D. 221.

(g) *Daubuz v. Lavington*, 13 Q. B. D. 347; *Hall v. Comfort*, 1880, p. 75. (i) *Isaacs v. Diamond*, W. N. 18 Q. B. D. 11.

in default of appearance, when the writ has only been posted on the premises, can only be signed after a judge's order has been obtained (*j*).

Before the Judicature Acts and Orders a writ of ejectment was not subject to the same rules as to service as writs in other actions, and might in very many cases be served on persons other than the defendant, without leave (*k*).

Every tenant to whom any writ in ejectment shall be delivered, or to whose knowledge it shall come, shall forthwith give notice thereof to his landlord or his bailiff or receiver, under penalty of forfeiting the value of three years' improved or rack-rent (*l*) of the premises demised or holden in the possession of such tenant to the person of whom he holds, to be recovered by action in any Court of common law having jurisdiction for the amount.

C. L. P. Act,  
1852, s. 209.

Tenants to  
give notice  
of writ to  
landlords.

This section only applies when the action is on a title which is inconsistent with the landlord's title (*m*). A landlord can generally get a judgment against his tenant set aside, if he has not received notice of the writ, so as to enable him to apply for leave to appear and defend (*n*), and this even after execution of a writ of possession (*o*); the terms of paying the costs of the judgment and execution are usually imposed upon him (*n*).

Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or judge whenever the whole subject-matter of the action

Ord. XI. r. 1.

Service out  
of the juris-  
diction.

(*j*) Annual Practice, notes to 647.  
Order IX. r. 9.

(*k*) C. L. P. Act, 1852, s. 170;  
*vide* Day's C. L. Act, p. 179  
(ed. 4).

(*l*) *Crocker v. Fothergill*, 2 B.  
& Ald. 652.

(*m*) *Buckley v. Buckley*, 1 T. R.

(*n*) *Doe v. Roe*, 2 H. & W.  
130; *Doe v. Roe*, 4 Burr. 1996;  
*Doe v. Roe*, 11 Price, 507.

(*o*) *Doe v. Roe*, 5 Taunt. 205;  
*Goodtitle v. Badtitle*, 4 Taunt.  
820.

is land situate within the jurisdiction (with or without rents or profits).

Ord. XII.  
r. 25.  
Appearance  
by person  
not named in  
writ.

Any person not named as a defendant in a writ of summons for the recovery of land may by leave of the Court or a judge appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or by his tenant.

Ord. XII.  
r. 26.  
By landlord.

Any person appearing to defend an action for the recovery of land as landlord, in respect of property whereof he is in possession only by his tenant, shall state in his appearance that he appears as landlord.

Ord. XII.  
r. 27.  
Person not  
named as  
defendant.

Where a person not named as defendant in any writ of summons for the recovery of land has obtained leave of the Court or a judge to appear and defend, he shall enter an appearance according to the foregoing rules of this order, intituled in the action against the party named in the writ as defendant, and shall forthwith give notice of such appearance to the plaintiff's solicitor, or to the plaintiff if he sues in person, and shall in all subsequent proceedings be named as a party defendant to the action.

Where the person not in possession by himself or his tenant was sued and allowed judgment to go by default, the tenant who was in actual possession and was ejected, was allowed to have the judgment set aside upon being added as a defendant (*p*).

The application for leave to appear and defend may be made *ex parte* (*q*). If the affidavit shows a good *prima facie* case of possession by himself or his tenant, leave will be given without deciding any nice questions of law or fact (*r*). Leave has been given to a devisee in trust (*s*),

(*p*) *Minet v. Johnson*, 63 L. T. 608; *Whitworth v. Humphreys*, 507. 5 H. & N. 185.

(*q*) *Form*, App. A, p. 290.

(*s*) *Lovelock v. Doncaster*, 4 T.

(*r*) *Croft v. Lumley*, 4 E. & B. R. 122.

an heir-at-law (*t*), a remainderman whose remainder has become vested in possession (*t*), a mortgagee (*u*), a mortgagor (*x*); leave has been refused to a tenant by *elegit* to whom the sheriff had not given possession<sup>1</sup> (*y*), and to a remainderman when the tenants had attorned to someone else (*z*). Leave will be given though the applicant be resident abroad (*u*). The position of a person so appearing will be no better than that of the original defendant (*b*).

Any person appearing to a writ of summons for the recovery of land shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his memorandum of appearance, or in a notice intituled in the action and signed by him or his solicitor. Such notice shall be served within four days after appearance, and an appearance not limited as above-mentioned shall be deemed an appearance to defend for the whole.

Ord. XII.  
r. 28.  
Limiting  
defence.

The notice mentioned in the last preceding rule shall be in the Form No. 3 in Appendix A, Part II., with such variations as circumstances may require (*c*).

Ord. XII.  
r. 29.

In case no appearance shall be entered in an action for the recovery of land, within the time limited by the writ for appearance, or if an appearance be entered but the defence be limited to part only, the plaintiff shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land

Ord. XIII.  
r. 8.  
Default of  
appearance.

(*t*) *Lovelock v. Doncaster*, 3 T. R. 783.

(*u*) *Doe v. Cooper*, 8 T. R. 645.

(*x*) *Doe v. Roe*, 4 Taunt. 887.

(*y*) *Thompson v. Tomkinson*, 11 Exch. 442; *Croft v. Lumley*, *supra*.

(*z*) *Whitworth v. Humphreys*, 5 H. & N. 186.

(*a*) *Butler v. Meredith*, 11 Exch. 85.

(*b*) *Doe v. Smythe*, 4 M. & S. 347; *Doe v. Birchmore*, 9 A. & E. 662; *Fairclaim v. Shamtitle*, 3 Burr. 1290, 1295; *Doe v. Creed*, 5 Bing. 327.

(*c*) App. A, p. 289.

or of the part thereof to which the defence does not apply.

If there be several defendants, who do not all make default, judgment can be signed against those who do; the judgment is in the nature of an interlocutory judgment, and the execution does not issue until judgment is obtained against all the defendants (*d*).

It is to be observed that this rule does not give the plaintiff his costs.

Ord. XIII.  
r. 9.

Where the plaintiff has indorsed a claim for mesne profits, arrears of rent, double value, or damages for breach of contract or wrong or injury to the premises claimed, upon a writ for the recovery of land, he may enter judgment as in the last preceding rule mentioned for the land; and may proceed as in the other preceding rules of this order mentioned as to such other claim so indorsed.

Ord. XIV.  
r. 1.  
Summary  
judgment.

Where the defendant appears to a writ of summons specially indorsed under Order III., rule 6, the plaintiff may apply, under the provisions of this rule, for final judgment for the recovery of the land (with or without rent or mesne profits), and costs.

C. L. P. Act,  
1852, s. 213.  
Security for  
costs and  
damages.

Where the term or interest of any tenant now or hereafter holding under a lease or agreement in writing any lands, tenements or hereditaments for any term or number of years, certain, or from year to year, shall have expired or been determined either by the landlord or tenant by regular notice to quit, and such tenant, or anyone holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made and signed by the landlord or his agent, and served personally upon or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord

(*d*) Annual Practice, notes to Order XIII. r. 8.



shall thereupon proceed by action of ejectment for the recovery of possession, it shall be lawful for him at the foot of the writ in ejectment, to address a notice to such tenant or person, requiring him to find such bail, if ordered by the Court or a judge, and for such purposes as are hereinafter next specified; and upon the appearance of the party on an affidavit of the service of the writ and notice, it shall be lawful for the landlord producing the lease or agreement or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid, to move the Court or apply by summons to a judge at chambers for a rule or summons for such tenant or person to show cause, within a time to be fixed by the Court or judge on a consideration of the situation of the premises, why such person should not enter into a recognizance by himself and two sufficient sureties in a reasonable sum conditioned to pay the costs and damages which shall be recovered by the claimants in the action; and it shall be lawful for the Court or judge upon cause shown, or upon affidavit of the service of the rule or summons in case no cause shall be shown, to make the same absolute in the whole or in part, and to order such tenant or person, within a time to be fixed, upon a consideration of all the circumstances, to find such bail, with such conditions and in such manner as shall be specified in the said rule or summons, or such part of the same so made absolute; and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the Court or judge to enlarge the time for obeying the same, then the lessor or landlord filing an affidavit

that such rule or order has been made and served and not complied with shall be at liberty to sign judgment for recovery of possession and costs of suit in the form contained in the Schedule (A) to this Act annexed, marked No. 21, or to the like effect.

The practice under Order XIV. in actions of ejectment is the same as in any other action. The above sections of the Common Law Procedure Act, 1852, have not been repealed (*e*), but in practice they have been superseded by Order III., rule 6, and Order XIV. of the Rules of the Supreme Court which are much more beneficial to the landlord.

If a claim for possession by a landlord purports to be specially indorsed under Order III., rule 6, together with a claim for arrears of rent, summary judgment may be obtained for the rent though the claim for possession is one which cannot be specially indorsed (*f*).

Ord. XVIII.  
r. 2.  
Joinder of  
other causes  
of action.

No cause of action shall, unless by leave of the Court or a judge, be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent or double value in respect of the premises claimed or any part thereof, and damages for breach of any contract under which the same or any part thereof are held, or for any wrong or injury to the premises claimed. Provided that nothing in this order contained shall prevent any plaintiff in an action for foreclosure or redemption from asking for or obtaining an order against the defendant for delivery of the possession of the mortgaged property to the plaintiff on or after the order absolute for foreclosure or redemption, as the case may be, and such an action for foreclosure or redemption and for such delivery of possession shall not

(*e*) 46 & 47 Vict. c. 49.

(*f*) *Arden v. Boyce*, 10 Times R. 253.

be deemed an action for the recovery of land within the meaning of these rules. Provided also that in case any mortgage security shall be foreclosed by reason of the default to redeem by any plaintiff in a redemption action, the defendant in whose favour such foreclosure has taken place, may by summons apply to the Court or a judge for an order for delivery to him of possession of the mortgaged property, and such order may be made thereupon as the justice of the case shall require (*g*).

This rule applies to counter-claims (*h*). Leave to join is granted upon an *ex parte* application, which must be made before the writ is issued (*i*), for leave will only be given after issue of writ when a very special case is made out (*k*). If a claim has been joined without leave, the defendant can enter a conditional appearance (*l*), and apply to have the writ set aside as irregular. After unconditional appearance, it will be too late to make such an application (*m*); but the defendant can raise the point in his statement of defence (*n*). A plaintiff who has joined a claim without leave cannot cure the irregularity by his statement of claim, but must amend his writ (*n*). It is a matter of discretion whether leave will be given or not, and in practice it is only given when the causes of action arise out of the same state of circumstances and are not

(*g*) For the decisions previous to the addition of the latter part of this rule, see *Tavell v. Slate Co.*, 3 Ch. D. 629; *Wood v. Wheeler*, 22 Ch. D. 281; *Harlock v. Ashberry*, 19 Ch. D. 539; *Hoar v. Loe*, W. N. 1884, p. 241; *Sutcliffe v. Wood*, 50 L. T. 706; *Withall v. Nixon*, 28 Ch. D. 413. Since the addition the decisions are:—*Salter v. Edgar*, 54 L. T. 374; *Lacon v. Tyrrell*,

56 L. T. 483.

(*h*) *Compton v. Preston*, 21 Ch. D. 138.

(*i*) *Re Pilcher*, 11 Ch. D. 905.

(*k*) *Musgrave v. Stevens*, W. N. 1881, p. 163; *Brandreth v. Shears*, W. N., 1883, p. 89.

(*l*) Ord. XII. r. 30.

(*m*) *Mulckern v. Doerks*, 53 L. J. Q. B. 527.

(*n*) *Wilmot v. Freshold House Co.*, 51 L. T. 552.

totally different (*o*). Leave has been given to join the following claims: a claim for administration of the personal estate of the intestate whose realty is sought to be recovered (*p*); for delivery up and cancellation of a deed relating to the land (*q*); for damages for assault by the defendant in entering upon the land (*r*); for a re-conveyance (*s*); for a receiver, though in this case the Court said that leave was probably unnecessary (*t*). No leave is required to join a claim for an injunction restraining interference with the land (*u*), or restraining breaches of covenants in a lease under which the property was demised to the defendant (*x*).

Ord. XIX. r. 4.  
Pleadings.

Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim, but not the evidence (*y*) by which they are to be proved.

Statement of  
claim.

The statement of claim in actions for the recovery of land is subject to the same rules as every other statement of claim (*z*). It must show a good *prima facie* title to the land, deducing that title through every stage from the last person through whom the plaintiff claims and who had possession under a claim of title (*a*). It need only allege the fact of possession by the defendant (*b*). If the plain-

(*o*) *Re Pilcher, supra*.

(*p*) *Kitching v. Kitching*, 24 W. R. 901; *Cook v. Enchmarch*, 2 Ch. D. 111.

(*q*) *Cook v. Enchmarch, supra*.

(*r*) *Dennis v. Crompton*, W. N. (1882) p. 121.

(*s*) *Manisty v. Kenealy*, 24 W. R. 918.

(*t*) *Allen v. Kennet*, 24 W. R. 845; *Kendrick v. Roberts*, 46 L. T. 59.

(*u*) *Kendrick v. Roberts, supra*.

(*z*) *Read v. Wotton*, [1893] 2 Ch. 171.

(*y*) *Evelyn v. Evelyn*, 42 L. T. 248.

(*a*) *Philips v. Philips*, 4 Q. B. D. 127, 132. For Forms, see App. A, p. 288.

(*b*) *Philips v. Philips, supra*; *Davis v. James*, 26 Ch. D. 778; *Hodgins v. Hickson*, 39 L. T. 644.

(*b*) *Hodgins v. Hickson, supra*.

tiff is seeking to recover possession as landlord he need only show the creation of the tenancy and its determination, and, if he is not the original lessor, how the reversion devolved upon him from the original lessor.

No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence, that he is so in possession, and it shall be taken to be implied in such statement that he denies, or does not admit the allegations of fact contained in the plaintiff's statement of claim. He may, nevertheless, rely upon any ground of defence which he can prove, except as hereinbefore mentioned.

Ord. XXI.  
r. 21.  
Defence.

A statement of defence need only state that the defendant is in possession, unless he relies upon an equitable defence. Any equitable defence must be pleaded fully by stating all material facts (c). It seems clear from the very words of this rule that the Statute of Limitations need not be pleaded (d), it not being an equitable defence.

There is no rule that a counter-claim cannot be pleaded to an action for the recovery of land, but, on the contrary, Order XIX., rule 3, allows such a counter-claim subject to the discretion of a Court or judge to exclude it. In practice a counter-claim will probably not be excluded if it arises out of the same circumstances as the claim, or if there is a claim for mesne profits or other sum of money (e).

Counter-claims.

(c) *Sutcliffe v. James*, 40 L. T. 875. *gerald v. Day*, 6 L. R. Ir. 326; *Hildige v. Farrell*, 8 L. R. Ir.

(d) *Dawkins v. Penrhyn*, 4 App. Cas. 51. 158; *Carew v. Christopher*, *id.* 252.

(e) See Ord. XIX. r. 3; *Fitz-*

Ord. XXVII.  
r. 7.

Default of  
defence.

In an action for the recovery of land, if the defendant makes default as mentioned in rule 2 [in delivering a defence] the plaintiff may enter a judgment that the person whose title is asserted in the writ of summons shall recover possession of the land with his costs. Where the plaintiff has indorsed a claim for mesne profits, arrears

Ord. XXVII.  
r. 8.

of rent, or double value in respect of the premises claimed, or any part of them, or damages for breach of contract upon a writ for the recovery of land, if the defendant makes default as mentioned in rule 2, or if there be more than one defendant some or one of the defendants make such default, the plaintiff may enter judgment against the defaulting defendant or defendants and proceed as mentioned in rules 4 and 5. If the defendant deliver a defence which purports to offer an answer to part only of the plaintiff's alleged cause of action, the plaintiff may by leave of the Court or a judge enter judgment final or interlocutory, as the case may be, for the part unanswered ; provided that the unanswered part consists of a separate cause of action, or is severable from the rest. Provided also that where there is a counter-claim, execution on any such judgment as above mentioned in respect of the plaintiff's claim shall not issue without leave of the Court or a judge (*f*).

Ord. XXVII.  
r. 9.

Defence as  
to part only  
of claim.

Ord. XXXI.  
Discovery.

The plaintiff in an action for recovery of land is entitled to discovery from the defendant by interrogatories (*g*), and by affidavit of documents (*h*). The defendant may refuse to answer as to any facts, and to produce any documents, which relate solely to his own title, and do not in any way tend to prove or support the plaintiff's case (*i*). Defen-

(*f*) *Gosset v. Campbell*, W. N. (77) 134.

(*g*) *Lyell v. Kennedy*, 8 App. Cas. 217.

(*h*) *New British Co. v. Peed*, 3 C. P. D. 196 ; *Wrentmore v. Hagley*, 46 L. T. 741.

(*i*) *Roberts v. Oppenheim*, 26

dants, who are purchasers for valuable consideration without notice of the plaintiff's title, are not thereby protected from giving discovery (*k*). Discovery will not be granted unless the Court is satisfied that the plaintiff has a reasonable cause of action, and probably never before statement of claim is delivered (*l*).

If, when a trial is called on, the plaintiff appears, and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him. Ord. XXXVI. r. 31. Trial.

Under the old practice, if the defendant did not appear at the trial, the plaintiff in an action of ejectment was entitled to recover without any proof of title (*n*).

A judgment for the recovery or for the delivery of possession of land may be enforced by writ of possession. Ord. XLII. r. 5.

A judgment or order (*o*) that a party do recover possession of any land may be enforced by writ of possession in manner before the commencement of the principal act used in actions of ejectment in the superior courts of common law. Execution. Ord. XLVII. r. 1.

Where by any judgment or order any person therein named is directed to deliver up possession of any lands to some other person, the person prosecuting such judgment or order shall, without any order for that purpose, be entitled to sue out a writ of possession on filing an affidavit showing due service of such judgment or order and that the same has not been obeyed (*p*). Ord. XLVII. r. 2.

Ch. D. 724; *Lyell v. Kennedy*, *supra*; *Horton v. Bott*, 2 H. & N. 249; *Emmerson v. Ind*, 33 Ch. D. 323; 12 App. Cas. 300.

(*k*) *Emmerson v. Ind*, *supra*.

(*l*) *Philips v. Philips*, 40 L. T. 815.

(*n*) C. L. P. Act, 1852, s. 183,

repealed by Statute Law Revision Act, 1883 (46 & 47 Vict. c. 49).

(*o*) *Withall v. Nixon*, 28 Ch. D. 413; *General Share Co. v. Wetley Co.*, 23 Ch. D. 260.

(*p*) *Hall v. Hall*, 47 L. J. Ch. 680.

Ord. XLVII.  
r. 3.

Upon any judgment or order for the recovery of any land and costs, there may be either one writ or separate writs of execution for the recovery of possession and for the costs at the election of the successful party.

The plaintiff will be allowed to issue a writ of possession though his estate has terminated since the commencement of the action, unless the defendant show affirmatively that it will be unjust and futile to issue such writ (*q*).

The sheriff is allowed a reasonable time within which to execute the writ; he cannot refuse to execute it if required to do so, and if he has an opportunity and is not prevented (*r*). The plaintiff must point out the premises and the sheriff must deliver them to him at the plaintiff's peril (*s*). If the plaintiff has recovered possession of the whole, the sheriff must put him in possession of the whole by turning everyone out; if of an undivided portion, the sheriff must only put him in possession of that portion (*t*). If the sheriff puts him in possession of a part only, the plaintiff may have a new writ for the rest (*u*). When possession has once been peaceably given, the plaintiff cannot have a fresh writ if the defendant retakes possession (*x*), unless the first execution of the writ has in reality been defeated by the defendant immediately retaking possession forcibly (*y*); and not even then if the rights of the parties have been changed.

Staying  
proceedings

Proceedings will be stayed in a subsequent action for the recovery of land until the costs of a prior action are

(*q*) *Knight v. Clarke*, 15 Q. B. D. 294.

(*r*) *Mason v. Paynter*, 1 Q. B. 974, 981.

(*s*) *Cottingham v. King*, 1 Burr. 629; *Connor v. West*, 5 Burr. 2672; *Doe v. Wilson*, 2 Stark. 477.

(*t*) *Doe v. Dawson*, 3 Wils. 49; *Doe v. King*, 6 Exch. 791, 793.

(*u*) *Devereux v. Underhill*, 2 Keb. 245.

(*x*) *Doe v. Roe*, 1 Taunt. 55.

(*y*) *Doe v. Roe*, 2 Dowl. N. S. 407; *Kingsdale v. Mann*, 6 Mod. 27; *Doe v. Roe*, 9 Dowl. 971.



paid, if the subsequent action is brought to litigate the same title as the prior action (z); unless the result of the prior action was caused by fraud or perjury, or arose from some miscarriage for which the defeated party was not responsible (a). It is not necessary that the parties or the premises should be the same as in the prior action, if the same title is in substance in issue (b). The length of the time which has elapsed between the first and second action is immaterial (c).

until payment of costs of previous action.

The costs in an action for the recovery of land are subject to the same rules as the costs in other actions (d). If a plaintiff claims several closes and recovers some only, the verdict and judgment are distributive, and, if the costs follow the event, the defendant will be entitled to costs caused by the claim for those closes in respect of which the plaintiff failed (e).

Costs.

(z) *Harvey v. Baker*, 2 Dowl. N. S. 75; *Doe v. Roe*, 4 East, 585; *Doe v. Stevenson*, 3 B. & P. 22; *Doe v. Alston*, 1 T. R. 491.

(a) *Doe v. Standish*, 2 Dowl. N. S. 26; *Short v. King*, 2 Str. 680; *Tichborne v. Mostyn*, L. R. 8 C. P. 29.

(b) *Tichborne v. Mostyn*, *supra*; *Doe v. Harland*, 10 A. & E. 761; *Doe v. Roe*, 8 Dowl. 444, 449;

*Doe v. Roe*, 8 T. R. 645; *Doe v. Roe*, 5 B. & Ad. 878; *Doe v. Law*, 2 W. Blac. 1180; *Doe v. Hatherley*, 2 Str. 1152; *Doe v. Bather*, 12 Q. B. 941, 948; *Keene v. Angel*, 6 T. R. 740.

(c) *Tichborne v. Mostyn*, *supra*; *Keene v. Angel*, *supra*.

(d) Ord. LXV. r. 1.

(e) *Jones v. Curling*, 13 Q. B. D. 262.

## CHAPTER XXIII.

### ACTION IN THE COUNTY COURT.

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|---|---|
| <p>1. <i>Ordinary Action for Recovery of Land</i>, 268.</p> | <p>2. <i>Action by Landlord to Recover Possession</i>, 274.</p> |
|---|---|

#### 1. *Ordinary Action to Recover Land.*

County Courts  
Act, 1888,  
s. 56.

s. 59.  
Jurisdiction  
in ejectment.

s. 60.

THE jurisdiction of county courts in actions for the recovery of land is now such as is conferred upon them by the County Courts Act, 1888 (*a*). By sect. 56 of that Act it is provided that "except as in this Act provided, the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments (*b*), or to any toll, fair, market or franchise shall be in question;" and sect. 59 confers jurisdiction as follows: "All actions of ejectment, where neither the value of the lands, tenements, or hereditaments, nor the rent payable in respect thereof, shall exceed the sum of £50 by the year may be brought and prosecuted in the Court of the district in which the lands, tenements or hereditaments are situate." It is further provided by sect. 60 that "a judge shall have jurisdiction to try any action in which the title to any corporeal or incorporeal hereditaments shall come in question where neither the value of the

(*a*) 51 & 52 Vict. c. 43; see *App. B*, p. 369.

(*b*) As to what is a hereditament, see:—*Tomkins v. Jones*, 22 Q. B. D. 599; *Chew v. Holroyd*, 8 Exch. 249; *Moor v.*

*Denn*, 2 B. & P. 247; *Harris v. Davison*, 15 Sim. 128, 134; *Baddely v. Denton*, 4 Exch. 504; *Stephenson v. Raine*, 2 E. & B. 744; *Lloyd v. Jones*, 6 C. B. 81; *Co. Litt.* 6 a.

lands, tenements or hereditaments in dispute, nor the rent payable in respect thereof, shall exceed the sum of £50 by the year, or in case of an easement or licence, where neither the value nor reserved rent of the lands, tenements or hereditaments in respect of which the easement or licence is claimed, or on, through, over, or under which the easement is claimed" shall exceed £50 a year.

It will be seen that if either the rent or the value exceeds £50 a year, the county court has no jurisdiction. The value of the lands means their actual marketable value, and the best criterion of this is the rent which would be paid by the tenant in occupation (c). The rent "payable in respect of the lands" means the rent payable between the litigant parties, and not that payable to the defendant by a sub-tenant, though this latter is strong, but not conclusive, evidence of the value (d), and such rent must be payable in respect of the actual premises in dispute (e).

If the county court judge decides upon evidence that he has jurisdiction, his decision is final, unless he has arrived at his decision under a mistake of law (f). If the defendant has failed upon a summons for prohibition, he cannot afterwards raise the question of rent or value at the trial (g).

The defendant in any action of ejectment within the jurisdiction of the Court may, by sect. 59, "within one month from the day of service of the summons, apply to a judge of the High Court at Chambers for a summons to

Rent.

Value.

S. 59.

Removal of  
action to  
High Court.

(c) *Elston v. Ross*, L. R. 4 Q. J. Q. B. 228.

B. 4; see, too, *Crowley v. Vitty*, 7 Exch. 319.

(f) *Brown v. Cocking*, L. R. 3 Q. B. 672.

(d) *Brown v. Cocking*, L. R. 3 Q. B. 672.

(g) *Symons v. Rees*, 1 Ex. D. 416.

(e) *Stolworthy v. Powell*, 55 L.

the plaintiff to show cause why such action should **not** be tried in the High Court on the ground that the title to lands or hereditaments of greater annual value than £50 would be affected by the decision in such action; and on the hearing of such summons, the judge of the High Court, if satisfied that the title to other lands would be so affected, may order such action to be tried in the High Court, and thereupon all proceedings in the Court in such action shall be discontinued."

What claims may be joined with ejectment.

No cause of action shall, unless by the leave of the judge or registrar, be joined with an action for the recovery of land, except claims in respect of mesne profits, or arrears of rent, or double value in respect of the premises claimed, or any part thereof, or damages for breach of any contract under which the same or any part thereof are held, or for any wrong or injury to the premises claimed (*h*).

Particulars of claim.

In all actions for the recovery of land, the particulars shall contain a full description of the property sought to be recovered, and of the annual value thereof, and of the rent, if there be any, fixed or paid in respect thereof (*i*).

Service of summons.

"The summons in an action to recover lands under sect. 59 should, in order to insure its service, be delivered to the bailiff forty clear days at least before the return day, and shall be served thirty-five clear days before the return day thereof" (*k*).

Where vacant possession.

"Service of the summons in an action to recover land may, in case of vacant possession (*l*), if it cannot otherwise be effected, be made by posting a copy of the summons

(*h*) County Court Rules, 1889, Ord. IV. r. 1. See notes on the same rule in the High Court, p. 260.

(*i*) *Id.* Ord. VI. r. 4.

(*k*) Ord. VII. r. 7. This is altered from the old rule; see *Barker v. Palmer*, 8 Q. B. D. 9.

(*l*) See p. 234.

upon the door of the dwelling-house or other conspicuous part of the premises" (m).

"Any defendant in an action to recover lands may at any time before the return day, confess the action as to the whole or any part of the lands by signing in the presence of any registrar or of one of his clerks, or of a solicitor, and attested by the person in whose presence it is signed, an admission of the title of the plaintiff to the lands or to the said part thereof, and of his rights to the possession thereof; and the registrar shall upon receipt of such admission further give notice thereof by post to the plaintiff, and the Court may on the return day upon proof of the signature of the defendant to such admission by affidavit or otherwise, in case the same is not attested by a registrar or his clerk, and without any further proof of the plaintiff's title (if no defendant other than the defendant signing such admission defends for the said lands or the said part thereof) give judgment for the plaintiff for the recovery of possession and for costs: Provided that, if the plaintiff receive notice of such admission before the return day, he shall not be entitled as against any defendant signing to any costs incurred subsequently to the receipt of such notice except the costs of attending the Court on the return day, unless the Court shall otherwise order. Provided also that where the admission is not signed by all the defendants defending for the said lands, or the said part thereof, the trial shall proceed against all the defendants who shall not have signed, as if no admission had been signed" (n).

Confession  
by defendant  
of claim.

"In actions for the recovery of land any person not named as a defendant in the summons may by leave of the judge or registrar be allowed to appear and defend on

Person not  
named as  
defendant  
may appear.

(m) Ord. VII. r. 21. See p. 254.

(n) Ord. IX. r. 6.

filing twelve clear days before the return day, an affidavit together with as many copies thereof as there are plaintiffs and defendants, showing that he is in possession either by himself or his tenant of the property or some part thereof mentioned in the particulars (such part being described in the affidavit with reasonable certainty), and upon such affidavit being filed, the registrar shall enter the name, address, and description of the person filing the same in the plaint book as a defendant in addition to the name of every person originally made defendant; and shall ten clear days before the return day give notice, according to the form in the appendix, or otherwise, to the plaintiffs and the original defendants, that the person filing the affidavit has filed the same and will appear and defend at the trial of the action, annexing to each notice a copy of the affidavit. In all subsequent proceedings in the action, the person filing the affidavit shall be named as a defendant (*p*).

Tenant must give notice of the action to his landlord.

By the Common Law Procedure Act, 1852, "Every tenant to whom any writ in ejectment shall be delivered, or to whose knowledge it shall come, shall forthwith give notice thereof to his landlord, or his bailiff or receiver, under penalty of forfeiting the value of three years improved or rack rent of the premises demised or holden in the possession of such tenant, to the person of whom he holds, to be recovered by action in any court of common law having jurisdiction for the amount" (*q*).

Notice limiting defence to part of property.

"In actions for the recovery of land any defendant may, twelve clear days before the return day, file with the registrar a notice in writing, according to the form in the appendix, signed by himself or his solicitor, that he intends

(*p*) Ord. X. r. 4.

see App. B, p. 343.

(*q*) 15 & 16 Vict. c. 76, s. 209 ;

to limit his defence to a part only of the property mentioned in the particulars, describing that part in such notice with reasonable certainty, and the registrar shall ten clear days before the return day send the same by post to the plaintiff" (r).

"Actions for the recovery of land or tenements or to enforce any right relating to lands, or for the recovery of any damages in respect of any such right, may at the instance of either party be tried by a jury" (s). Trial by a jury.

"Where in an action to recover land, or any damages in respect of any right relating to land, the title of the plaintiff shall appear to have existed, as alleged in the summons, at the time of the entry of the plaint, but to have expired before the return day, the plaintiff shall be entitled to judgment according to the fact that he was so entitled, and for his costs of the action, unless the judge shall otherwise order" (t). Plaintiff's title expiring before return day.

"A judgment or order for the recovery of or for the delivery of the possession of land, may be enforced by warrant of possession which shall be according to the form in the appendix" (u). Execution.

"Where in an action to recover land judgment is given for the plaintiff execution may issue upon a day to be named in the judgment, and if no day be named, then it may issue after the expiration of fourteen clear days from the day on which judgment shall have been given" (x).

"Where in an action to recover land judgment has been obtained for the recovery of possession and costs, there may be either one warrant or separate warrants of

(r) Ord. X. r. 5. Form, see p. 266, for the same rule in the App. A, p. 289. High Court.

(s) Ord. XXII. r. 3. (u) Ord. XXV. r. 45.

(t) Ord. XXIII. r. 10. See (x) *Id.* r. 46.

execution for the recovery of possession and for the costs, at the election of the plaintiff" (y).

"Where in an action to recover land judgment is given for the defendants or any of them with costs, execution may issue for the costs on the day named in the judgment, and if no day be named then at the expiration of fourteen clear days from the day on which judgment shall have been given" (z).

"When an order is made for the recovery or for the delivery of the possession of land to any person, the warrant of possession shall not be issued by the registrar without evidence by affidavit of service of the order and disobedience thereto" (a).

## 2. *By Landlord to Recover Possession.*

51 & 52 Vict.  
c. 43, ss. 138  
and 139.

Small tenements.

Besides the ordinary jurisdiction in ejectment, county courts have also jurisdiction in actions for the recovery of possession of tenements of comparatively small value by landlords against their tenants, which is conferred by sects. 138 and 139 of the County Courts Act, 1888 (b). The first of these sections deals with tenancies which have expired, or have been determined by notice to quit, and the other with tenancies where half a year's rent is in arrear and there is a right of re-entry for non-payment.

Relationship  
of landlord  
and tenant  
must be clear.

Proceedings under these sections can only be taken when it is clear that the ordinary relationship of landlord and tenant exists (c), and not when the relationship is only such as exists between mortgagee and mortgagor (d). If,

(y) Ord. XXV. r. 47.

(z) *Id.* r. 48.

(a) *Id.* r. 49.

(b) 51 & 52 Vict. c. 43. These sections are substituted for ss. 50—52 of 19 & 20 Vict. c. 108, which is now repealed.

(c) *Pearson v. Glazebrook*, L. R. 3 Ex. 27; *Jones v. Owen*, 5 D. & L. 669; *Banks v. Rebbeck*, 2 L. M. & P. 452; *Jones v. Thomas*, 4 L. T. 210.

(d) *Jones v. Owen*, *supra*.



therefore, a *bond fide* dispute arises as to the existence of this relationship the jurisdiction of the county court judge under these sections is ousted (*e*) and he must refuse to proceed (*f*); the dispute must appear to be *bond fide* and not merely be raised by the bare assertion on oath of the alleged tenant (*e*). He may, however, decide questions as to the sufficiency of a notice to quit (*g*), or as to the value of the premises, and his decision upon these is conclusive (*h*), unless by a mistake of law he has given himself jurisdiction. He has jurisdiction even if proceedings are pending in the High Court with regard to the possession of the same premises (*i*).

Under either of these sections the proceedings must be taken in the Court of the district in which the premises are situated (*k*). The County Courts Act, 1846 (*l*) did not enact that the proceedings must be taken in the court of the district in which the premises were situate, but it was decided that a warrant of possession could not issue in respect of premises out of the district (*m*).

When an action can be brought to recover possession under these sections (*n*), no action of ejectment shall be brought under sect. 59 (*o*) of the Act (*p*). In the county court an action under these sections (*n*) is distinguished as an action for the recovery of possession, and an action under sect. 59 (*o*) as an action for the recovery of land (*p*).

Where these sections can apply, action not to be brought under s. 59.

(*e*) *Marsh v. Dewes*, 17 Jur. 558; *Latham v. Spedding*, 3 L. M. & P. 378; *Kerkin v. Kerkin*, 3 E. & B. 399; *Emery v. Barnett*, 4 C. B. N. S. 423; *Lilley v. Harvey*, 5 D. & L. 648; *Lloyd v. Jones*, 6 C. B. 81.

(*f*) *Mountnoy v. Collier*, 1 E. & B. 630; *Thompson v. Ingham*, 14 Q. B. 710.

(*g*) *Fearon v. Norvall*, 5 D. & L. 439.

(*h*) *Brown v. Cocking*, L. R. 3 Q. B. 672.

(*i*) *Bissell v. Williamson*, 7 H. & N. 396.

(*k*) Ss. 138, 139.

(*l*) 9 & 10 Vict. c. 95, s. 122.

(*m*) *Ellis v. Peachy*, 18 L. J. Q. B. 137.

(*n*) Ss. 138, 139.

(*o*) See p. 269.

(*p*) County Court Rules, 1889, Ord. V. r. 3.

"Landlord,"  
definition of.

A landlord is defined to be "the person entitled to the immediate reversion of the lands, or, if the property be holden in joint-tenancy, coparcenary, or tenancy in common, shall be understood to mean any one of the persons entitled to such reversion" (g).

S. 138.

For what  
premises.  
Tenancy  
expired.  
Notice to  
quit.

Proceedings can be taken under sect. 138 when neither the value (r) of the premises nor the rent (r) exceeds £50 a year, and no fine or premium has been paid. If the term or interest has expired by effluxion of time (but not if it has been determined by a forfeiture (s)), or has been determined by notice to quit (t), and the tenant or any person claiming by, through, or under him, neglects or refuses to give up possession, the landlord may proceed by plaint and summons either against the tenant or such other person at his option (u). At the hearing the defendant may show good cause why an order should not be made to deliver up possession (u); if he fails to do so an order to give up possession either forthwith, or on or before a day named, may be made (u). The landlord must prove that the defendant still neglects or refuses to deliver up possession (u); the yearly value and rent of the premises (u); the holding (u); the expiration or determination of the tenancy (u); his title, if such title has accrued since the letting (u); and the service of the summons (x), if the defendant does not appear (u). If the order to deliver up

Hearing.

What land-  
lord must  
prove.

(g) S. 138.

(r) See p. 269.

(s) *Friend v. Shaw*, 20 Q. B. D. 374.

(t) The words in the repealed section (s. 50) of 19 & 20 Vict. c. 108, were "legal notice to quit," and it was decided that those words applied only to the notice to quit implied by law, and not to a notice to quit agreed

on between the parties; *Friend v. Shaw*, 20 Q. B. D. 374. The word "legal" is omitted from the present Act, which therefore applies to every case where a notice to quit is either implied by law or provided for by agreement.

(u) S. 138.

(x) See p. 270.

possession is not obeyed, the registrar must, on the application of the plaintiff, issue a warrant to the bailiff of the court to give possession to the plaintiff (y). Proof of service of the order is unnecessary (y). Execution.

In a proceeding against the tenant, the plaintiff may add a claim for rent or mesne profits or both not exceeding £50 (y), but not if the proceeding is against a sub-tenant or other person (z). When claim for rent or mesne profits can be joined.

The order of the county court under this section (a) is not conclusive as to the plaintiff's right to possession, and does not affect the rights of a person who is not a party to the proceedings, who may bring an action of trespass against the plaintiff for taking possession; possibly also it does not affect the rights of the person against whom the order is made, though perhaps the proceedings in the action to recover possession may be conclusive evidence against him (b). Protection is given by sect. 145 (b) only when the landlord, at the time of applying for the warrant, had lawful right to the possession. Order of judge not conclusive.

Proceedings may be taken under sect. 139 where neither the value (c) nor rent (c) of the premises exceeds £50 a year, whether a fine or premium has been paid or not (d). If the rent for one half year is in arrear, and there is no sufficient distress (e) upon the premises to meet such arrear, the landlord may, if he has a right by law (f) to re-enter for non-payment, proceed against the tenant by plaint and summons to recover possession (d). No formal demand or re-entry is necessary, but the service of the summons stands in lieu thereof (d). If the tenant, five S. 139. When proceedings may be taken. Non-payment of rent. Payment after action.

(y) S. 138.

7 Ex. 55; see *post*.

(z) *Campbell v. Loader*, 3 H. & C. 520, 538.

(c) See p. 269.

(a) S. 138.

(d) S. 139.

(b) *Campbell v. Loader*, 3 H. &

(e) See p. 232—3.

C. 538; *Hodson v. Walker*, L. R.

(f) It is difficult to understand what the words "by law"

What the  
landlord must  
prove.

Payment after  
judgment.

Execution.

Effect of  
execution of  
warrant.

Sub-tenant  
served with

clear days before the return day, pays into court all the arrears and the costs, the action ceases (*g*). If he does not do so, and at the hearing does not show good cause to the contrary, the judge may order possession to be given to the plaintiff on or before a day not less than four weeks from the hearing (*g*). The landlord must prove the yearly value (*h*) and rent (*h*) of the premises (*g*); that one half year's rent was in arrear before the plaint was entered (*g*); that no sufficient distress (*i*) was then to be found upon the premises (*g*); his power to re-enter (*g*); that the rent is still in arrear (*g*); his title, if such title has accrued since the letting (*g*); and the service of the summons if the defendant does not appear (*g*). The tenant may pay into court all rent in arrear and the costs before the day named for giving up possession, in which case the order will not be enforced (*g*). If he does not do so and does not give up possession, the registrar must, on the application of the plaintiff, issue a warrant to the bailiff of the court to give possession of the premises to the plaintiff (*k*). Proof of the service of the order is unnecessary (*k*).

From the time of the execution of the warrant the plaintiff holds the premises discharged of the tenancy, and the defendant and all persons claiming by, through, or under him are barred from all relief so long as the order of the court remains unreversed (*k*).

If a summons under either of these sections (*l*) is served

mean. A right to re-enter is created by agreement between the parties, and is not implied by law. If a right of re-entry is ever implied by law, it would seem that the words of this section would apply only in such case, by analogy to the decision

on s. 50 of 19 & 20 Vict. c. 108, on the words "legal notice to quit."

(*g*) S. 139.

(*h*) See p. 269.

(*i*) See p. 232, 233.

(*k*) S. 139.

(*l*) Ss. 138, 139.

on, or comes to the knowledge of, a sub-tenant of the plaintiff's immediate tenant, who occupies the whole or part of the premises, he must give notice thereof to his immediate landlord, who may then be added or substituted as a defendant to defend possession of the premises (*m*). If the sub-tenant does not give such notice he is liable to a penalty of three years' rack rent of his holding which his landlord may recover, whatever the amount, in the court from which the summons issued (*m*).

summons must give notice to his immediate landlord, who can defend.

A summons under these sections (*n*) may be served like an ordinary summons. If the defendant cannot be found, and if his dwelling is not known or admission thereto cannot be obtained to serve the summons, a copy of the summons must be posted on some conspicuous part of the premises, which will be good service (*o*).

Service of summons.

Actions under these sections (*n*) may, at the instance of either party, be tried by a jury (*p*). Costs may, where the court fees are paid on £5 or upwards, be allowed to solicitors upon the higher scale in the Appendix to the County Court Rules applicable to actions where the amount claimed exceeds £20, if the judge shall so order (*q*).

Trial by a jury.  
Costs.

The warrant of possession justifies the bailiff in entering upon the premises with the necessary assistants and giving possession, provided he enter between 9 A.M. and 4 P.M. (*r*).

Warrant of possession.

The warrant wherever issued must bear date on the day next after the last day in the order for delivery of possession and will continue in force for three months from such

(*m*) S. 140.

Ord. XXII. r. 3.

(*n*) Ss. 138, 139.

(*q*) *Id.* Ord. L. r. 19.

(*o*) S. 141.

(*r*) S. 142.

(*p*) County Court Rules, 1889,

date (s). No order for delivery of possession need be drawn up or served (s).

Protection of  
judges,  
registrars,  
bailiffs.

No action or prosecution can be brought against the judge or registrar for issuing the warrant, or the bailiff or other person for executing it, or affixing the summons by reason of the person who sued out the summons having had no lawful right to the possession of the premises (t).

Protection of  
landlord.

Neither the landlord nor his agent is deemed a trespasser because of any irregularity or informality in the mode of proceeding for possession under this Act, if at the time of applying for the warrant the landlord had a lawful right to possession; but the party aggrieved can sue for such irregularity or informality and recover for any special damage, provided it be claimed, and costs (u). If the special damage laid is not proved, the defendant is entitled to a verdict, and if proved but assessed at less than five shillings, the plaintiff can have no more costs than damages unless the judge certify for full costs (u).

(s) S. 143.

(t) S. 144.

(u) S. 145 ; *Hodson v. Walker*,  
L. R. 7 Ex. 55.

## CHAPTER XXIV.

### SUMMARY PROCEEDINGS BEFORE JUSTICES.

- |   |  |  |
|---|--|--|
| 1. <i>Landlord against Tenant</i> , p. 281. |  | 2. <i>Deserted Premises</i> , p. 283.  |
|   |  | 3. <i>Sundry other cases</i> , p. 285. |

UNDER various statutes justices have in certain cases jurisdiction in proceedings to recover possession of land, particularly in cases between landlords and tenants. These statutes and the jurisdiction conferred by them, will be dealt with separately in this chapter.

#### 1. *Landlord and Tenant.*

By 1 & 2 Vict. c. 74, when the term or interest of any tenant at will or for a term not exceeding seven years at a rent not exceeding £20 a year, or at no rent, and upon which no fine or premium has been paid or reserved, shall have ended or been duly determined by notice to quit (a) or otherwise (b), and such tenant or the person in actual occupation neglects or refuses to quit and deliver up possession of the premises or any part thereof, the landlord can proceed before justices of the district division or place within which the premises or any part thereof are situate in petty sessions (c).

Upon expiration or determination of tenancy.

1 & 2 Vict. c. 74.

The procedure is as follows: The landlord or his agent serves the person, who so refuses or neglects, with a written notice in the form provided by the schedule to the Act (d),

Procedure.

- (a) See Chap. VI.  
(b) Cole, Eject. 669.

- (c) S. 1, App. B, p. 332.  
(d) App. A, p. 288.

signed by the landlord or his agent, of his intention to proceed to recover possession. The notice must be served either personally or by leaving it with a person being in and apparently residing at the residence of the person so holding over, and it must be read over and explained by the person serving it to the person served. If the person holding over cannot be found and his residence is either unknown or admission thereto cannot be obtained the notice may be served by posting it upon some conspicuous part of the premises (e). The notice must state the place at which the application will be made (f), and, probably, that the applicant is "owner" or "agent to owner" (f).

## Hearing.

If the tenant or occupier do not appear and show cause why possession should not be given up, and still refuses and neglects to give up possession, the justices may, upon proof of the facts founding their jurisdiction and of the service of the notice, issue a warrant to the constables of the district (g) to deliver possession within a period therein named not less than twenty-one, nor more than thirty, clear days from the date of the warrant (h). The landlord must prove his title to the reversion if it has accrued since the letting (i). The tenant cannot dispute his landlord's title (k).

## Definitions.

## Person.

## Landlord.

A "person" is defined to be a body politic, corporate, or collegiate, as well as an individual; a "landlord" to be the person entitled to the immediate reversion in the lands, and, if the property is held in joint tenancy, coparcenary, or tenancy in common, any one of the persons entitled to such reversion; an "agent" to be any person

## Agent.

(e) S. 2, App. B, p. 333.

(f) *Delaney v. Fox*, 26 L. J.

C. P. 5.

(g) *Jones v. Chapman*, 14 M. & W. 124.(h) S. 1; *Jones v. Foley*, [1891]

1 Q. B. 730.

(i) S. 1.

(k) *Rees v. Davies*, 4 C. B. N. S. 56; see p. 26.



usually employed by the landlord in the letting of the premises, or in the collection of the rents thereof, or specially authorised to act in the particular matter by writing under the hand of such landlord (*l*).

Justices have no power to grant costs in these proceedings, as 11 & 12 Vict. c. 43 does not apply (*m*). Costs.

A person who applies for and obtains a warrant is not protected against an action by the tenant or occupier if he had not then a right to possession (*n*). It is a trespass to obtain such a warrant without having a right to possession, although no entry is made under the warrant (*o*). The tenant or occupier may bind himself to sue forthwith for such trespass, and thereupon execution of the warrant is stayed until judgment in the action (*o*). If the plaintiff succeeds, the warrant is superseded (*o*). Justices and constables are protected even if the applicant had not a right to possession (*p*). The landlord, if he has a right to possession, is not a trespasser by reason of any irregularity, but is only liable to an action on the case for special damage (*q*). Wrongfully obtaining warrant.  
  
Protection to justices and constables.

## 2. *Deserted Premises.*

By 11 Geo. 2, c. 19 (*r*), amended by 57 Geo. 3, c. 52, if a tenant who holds premises at a rack rent, or at a rent which is full three-fourths of the yearly value, under any demise or agreement whether verbal or written (*s*), whether a right of re-entry for non-payment of rent is reserved or not (*s*), is in arrear for one half year's rent (*s*) and deserts (*t*)

(*l*) S. 7, App. B, p. 335.

(*m*) Stone's Practice, 598, note (9th ed.); Oke's Mag. Syn. 1445 (13th ed.).

(*n*) S. 1, App. B, p. 332.

(*o*) Sa. 3, 4, App. B, pp. 333—334.

(*p*) S. 5, App. B, p. 334.

(*q*) S. 6, App. B, p. 335; *Delaney v. Fox*, 26 L. J. C. P. 5.

(*r*) S. 16, App. B, p. 295.

(*s*) App. B, p. 297.

(*t*) *Basten v. Carew*, 3 B. & C. 649; *Ashcroft v. Bourne*, 3 B. & Ad. 684, 685; *Ex parte Pitton*, 1 B. & Ald. 369.

the premises, and leaves them uncultivated or unoccupied so that no sufficient distress (*u*) can be had to counter**v**ail the arrears of rent, the landlord may proceed to recover possession under the Act.

**Procedure.**

The procedure is as follows (*v*): At the request of the landlord or his bailiff or receiver, two or more justices of the district shall go and view the premises and affix on the most notorious part thereof a written notice stating the day (at a distance of fourteen *clear* (*y*) days at least) upon which they will return to take a second view thereof. If upon such second view the tenant or someone on his behalf does not appear and pay the rent or there is not sufficient distress upon the premises, the justices may put the landlord into possession, and the lease, as to any demise therein only, becomes void.

Neither the information to the justices nor any inquiry by them need be upon oath, as they decide on their view whether the premises are deserted and there is no sufficient distress (*z*). If the justices from doubt as to their jurisdiction refuse to give possession, a mandamus will not be granted to compel them to do so (*a*).

**Appeal.**

The proceedings of the justices are examinable in a summary way by the next justice or justices of Assize, or, if the premises are in London or Middlesex, by the Queen's Bench Division, who may order restitution to the tenant with his costs and expenses. If they affirm the act of the justices they may award costs to the landlord not exceeding £5 (*b*). An order for restitution is made by justices of Assize in their individual capacity, and perhaps should be signed by them (*c*). Such an order

(*u*) See pp. 232—233.

649.

(*v*) S. 16, App. B, p. 296.

(*a*) *Ex parte Fulder*, 8 Dowl.

(*y*) *Creak v. Brighton*, 1 F. &

535.

F. 110.

(*b*) S. 17, App. B, p. 296.

(*z*) *Basten v. Carcu*, 3 B. & C.

(*c*) *R. v. Sewell*, 8 Q. B. 161.

should be directed to some person, or else there is no way of enforcing it (*d*).

The justices should draw up a record of their proceedings, and such record is an answer to any action against them, or anyone aiding them, or the landlord who receives possession (*e*). The landlord may, however, be liable to an action if he maliciously or upon false information moves the justices (*e*). Action by tenant.

If the premises are within the Metropolitan Police District, a police magistrate may on request of the landlord, his bailiff, or receiver, made in open Court, and upon proof of the arrears of rent and desertion, send a constable to view the premises and affix the notice. Upon the return of the warrant to the constable, and proof of its due execution, and that the rent has not been paid and that there is no sufficient distress, the magistrate may authorise a constable to put the landlord into possession (*f*). Premises in London.

The lord mayor or an alderman in London, and all stipendiary magistrates have the same powers as two justices, but they cannot send a constable to view (*g*). Of lord mayor, &c., and stipendiaries.

### 8. *Sundry other Cases.*

The procedure provided by 1 & 2 Vict. c. 74 is extended by subsequent statutes to the following cases:—

The recovery of school premises from masters of grammar schools, and from other schoolmasters (*h*). School premises.

The recovery of possession of allotment gardens for the poor under the Inclosure Act, 1845 (*i*). Allotment gardens.

(*d*) *R. v. Traill*, 11 Ad. & E. 761.

(*e*) *Ashcroft v. Bourne*, 3 B. & Ad. 684; *Basten v. Carrow*, 3 B. & C. 649.

(*f*) 3 & 4 Vict. c. 84, s. 13. App. B, p. 338.

(*g*) 11 & 12 Vict. c. 43, ss. 33, 34; *Edwards v. Hodges*, 15 C. B. 477.

(*h*) 3 & 4 Vict. c. 77, s. 19; 4 & 5 Vict. c. 38, s. 18.

(*i*) 8 & 9 Vict. c. 118, s. 111.

**Encroachments.** The recovery of possession from persons who have encroached upon lands to be enclosed (*k*).

**Charities.** The recovery of premises belonging to charities from schoolmasters or other officers or recipients of the benefit of a charity (*l*).

**Crown lands.** The recovery of possession of Crown lands (*m*).

**By churchwardens, overseers, and guardians.** Summary proceedings can also be taken before justices by churchwardens, overseers and guardians of the poor to recover parish property and poor allotments from the persons to whom they have been let, or from trespassers (*n*).

(*k*) 15 & 16 Vict. c. 79, s. 13 ; *R. v. Darlington*, 6 Q. B. 682.  
*Chilcote v. Youldon*, 29 L. J. M. (*m*) 22 Vict. c. 12, s. 5 ; 27 &  
 C. 197. 28 Vict. c. 57, s. 12.  
 (*l*) 23 & 24 Vict. c. 136, s. 13 ; (*n*) See Chap. 16, p. 180.

## APPENDIX A.

### FORMS.

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#### NOTICE TO QUIT.

##### 1.—BY LANDLORD.

To A. B.

I hereby give you notice to quit and deliver up possession of the [house or           ] and premises, with the appurtenances, situate [at    or in the parish of           ] in the county of           which you hold of me, as tenant thereof, on the (twenty-ninth) day of (September) next [or at the expiration of the year of your tenancy which shall expire next after the end of one half year from the service of this notice].

Dated the           day of           , 189 .  
Signed

##### 2.—BY TENANT.

To C. D.

I hereby give you notice that it is my intention to quit and deliver up possession of the [house or           ] and premises with the appurtenances situate [at    or in the parish of           ] in the county of           now held by me as your tenant thereof on the (twenty-ninth) day of (September) next.

Dated the           day of           , 189 .  
Signed

##### 3.—BY TENANT IN COMMON (LANDLORD).

To A. B.

I hereby give you notice of my intention to determine the tenancy under which you now hold of me [one undivided part or share *as the case may be*] of and in the [messuage or farm, and] premises with the appurtenances situate at           in

the county of , and require you to quit the same on the day of next [or at the expiration of the year of your tenancy which shall expire next after the end of one half year from the service of this notice].

Dated the day of , 18 .  
Signed .

1 & 2 VICT. c. 74.—NOTICE OF OWNER'S INTENTION TO APPLY TO JUSTICES TO RECOVER POSSESSION.

I [owner or agent to , the owner, as the case may be] do hereby give you notice that unless peaceable possession of the tenement [shortly describing it] situate which was held of me or of the said [as the case may be] under a tenancy from year to year or [as the case may be] which expired [or was determined] by notice to quit from the said [or otherwise, as the case may be], on the day of , and which tenement is now held over and detained from the said be given to [the owner or agent] on or before the expiration of seven clear days from the service of this notice, I , shall on next, the day of at of the clock of the same day, at apply to Her Majesty's Justices of the Peace acting for the district of [being the district, division, or place in which the said tenement or any part thereof is situate], in Petty Sessions assembled, to issue their warrant directing the constables of the said district to enter and take possession of the said tenement, and to eject any person therefrom.

Dated this

(Signed) .  
(Owner or Agent).

To Mr. .

STATEMENT OF CLAIM.

1.—LANDLORD AGAINST TENANT.

The plaintiff is entitled to the possession of a farm and premises called Church Farm, in the parish of , in the county of , which was let by the plaintiff to the defendant for the term of from the day of , which term has expired [or as tenant from year to year from the day of , which

said tenancy was duly determined by notice to quit expiring on the day of ].

The plaintiff claims possession and £ for mesne profits.

Place of Trial,

Signed

## 2.—HEIR-AT-LAW AGAINST STRANGER.

1. The plaintiff is entitled to the possession of Blackacre, in the parish of , in the county of

2. On or before the day of A. B. was seized in fee and in possession of the premises.

3. On the day of , the said A. B. died so seized, whereupon

4. The estate descended to the plaintiff, his eldest son and heir-at-law.

5. After the death of the said A. B., the defendant wrongfully took possession of the premises.

The plaintiff claims :—

1. Possession of the premises ;

2. Mesne profits from the day of .

Place of Trial,

Signed

## NOTICE LIMITING DEFENCE.

### 1.—IN THE HIGH COURT.

Take notice that the above-named defendant [A. B.] limits his defence to part only of the property mentioned in the writ of summons, namely, to the close, called "The Big Field."

Dated the day of , 18 .

(Signed)

of

Agent for

of

Solicitors for the above-named defendant.

To Messrs.

, the plaintiff's solicitors.

### 2. IN THE COUNTY COURT.

Take notice that the above-named defendant K. L. will at the trial of this action limit his defence to a part only of the property mentioned in the statement annexed to the summons ; that is to say [here describe the part, to which the defence is limited, with reasonable certainty].

To the Registrar of the Court and to the plaintiff.

W.Y.E.

U

## ACKNOWLEDGMENT OF TITLE.

I, \_\_\_\_\_, of \_\_\_\_\_, do hereby admit that I am now in possession of [or in receipt of the rents and profits of] all that messuage \_\_\_\_\_ with the appurtenances situate at [or in the pariah of \_\_\_\_\_] in the county of \_\_\_\_\_ by the permission of \_\_\_\_\_, of \_\_\_\_\_, and subject to the title of the said \_\_\_\_\_ under whom I now hold the same.

Dated the \_\_\_\_\_ day of \_\_\_\_\_ .  
Signed \_\_\_\_\_ .

To \_\_\_\_\_ .

APPLICATION, EX PARTE, BY LANDLORD FOR  
LEAVE TO DEFEND.

IN THE HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

[Name of Judge.]

[Title of action or matter and reference to the record.]

Let all parties concerned attend at my chambers in the Royal Courts of Justice, Strand, London, on \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_\_, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon.

[If a short return is granted, add "by special leave."]

On the hearing of an application on the part of A. B., that he may be at liberty to appear and defend this action [if so, as landlord of the above-named defendant, C. D.]. [If the applicant desires to limit his defence to a part only of the property mentioned in the writ, add :] For [here describe the part to which it is desired to limit the defence] being a part of the property mentioned in the said writ of summons.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_\_.



## APPENDIX B. ,

### STATUTES.

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5 RICH. 2, STAT. 1, c. 8.

“And also the king defendeth that none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law, and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by imprisonment of his body, and thereof ransomed at the king's will.” p. 24.

15 RICH. 2, c. 2.

An Act “for confirming and amending former statutes respecting riots and forcible entries;” “also it is accorded and assented, that the statutes and ordinances, made and not repealed, concerning those who make entries with strong hand into lands and tenements, or other possessions whatsoever, and them hold with force, and also of those that make insurrections, or great ridings, riots, routs, or assemblies, in disturbance of the peace, or of the common law, or in affray of the people, shall be holden, and kept, and fully executed, adding thereto, that at all times that such forcible entries shall be made, and complaint thereof cometh to the justice of peace, or to any of them, that such justices or justice take sufficient power of the county, and go to the place where such force is made, and if he or they find any that hold such place forcibly, after such entry made, they shall be taken and put into the next gaol, there to abide convict by the record of such justices or justice, until they have made fine and ransom to the king; and that all

pp. 19, 20.

people of the county, as well the sheriff as other, shall be attendant upon the same justices to go and assist the same justices, to arrest such offenders, upon pain of imprisonment, and to make fine to the king : and in the same manner it shall be done of those who make such forcible entries in benefices or offices of holy church."

4 HEN. 4, c. 8.

p. 24.

Intituled "a special assize shall be maintainable against a disseisor with force. The lord chancellor may in his discretion grant a special assize to try any forcible entry, under which the defendant if convicted, 'shall have one year's imprisonment and yield to the party grieved his double damages.'"

8 HEN. 6, c. 9.

pp. 19, 20.

For confirming and amending former statutes respecting forcible entries.

Recital of 15 Richard 2, c. 2, at length.

S. 2. And for that the said statute doth not extend to entries in tenements in peaceable manner, and after holden with force, nor if the persons which enter with force into lands and tenements, be removed and voided before the coming of the said justices or justice, as before, nor any pain ordained if the sheriff do not obey the commandments and præcepts of the said justices for executing the said ordinance ; many wrongful and forcible entries be daily made into lands and tenements by such as have no right ; and also divers gifts, feoffments, and discontinuances sometimes made to Lords, and other powerful persons, and extortioners within the said counties where they be conversant, to have maintenance, and sometimes to such persons as be unknown to them so put out, to the intent to delay and defraud such rightful possessors of their right and recovery for ever ; to the final disherison of divers of the king's faithful liege people, and likely it is daily to increase, if due remedy be not provided in this behalf ; our lord the king considering the premises hath ordained "that the said statute, and all other statutes of such entries or alienations made in times past shall be holden and duly executed ;

adding thereto, that 'if from henceforth any doth make any forcible entry in lands and tenements, or other possessions, or them hold forcibly after complaint thereof, made within the same county where such entry is made, to the justices of peace, or to one of them, by the party grieved, that the justices or justice so warned, within a convenient time shall cause, or one of them shall cause the said statute duly to be executed, and that at the costs of the party so grieved."

S. 3. "And moreover, though that such persons making such entry be present, or else departed before the coming of the said justices or justice, nevertheless the same justices or justice in some good town next to the tenements so entered, or in some other convenient place according to their discretion, shall have, p. 22. or either of them shall have authority and power to inquire, by the people of the same county, as well of them that make forcible entries in lands and tenements, as of them which hold the same with force; and if it be found before any of them that any doth contrary to this statute, then the said justices or justice shall cause the said lands and tenements so entered or holden as aforesaid to be resealed, and shall put the party so put out in full possession of the same lands and tenements so as aforesaid entered or holden."

S. 6. And moreover, if any person be put out, or disseised of any lands or tenements in forcible manner, or put out peaceably, and after holden out with strong hand; or after such entry, any feoffment or discontinuance in anywise thereof be made, to defraud, and take away the right of the possessor; that the party grieved in this behalf shall have assize of novel disseisin or a writ of trespass against such disseisor, and if pp. 18, 23. the party grieved recover by assize, or by action of trespass, and it be found by verdict, or in other manner by due form in the law that the party defendant entered with force into the lands and tenements, or them after his entry did hold with force, that the plaintiff shall recover his treble damages against the defendant; and moreover, that he make fine and ransom to the king, and that mayors, justices or justice of peace, sheriff and bailiffs of cities, towns, and boroughs having franchise shall have in the said cities, towns, and boroughs like

power to remove such entries, and in other the articles aforesaid, arising within the same, as the justices of peace and sheriffs in counties and countries aforesaid have.

p. 23. S. 7. Provided always, that they which keep their possessions with force in any lands and tenements whereof they or their ancestors, or they whose estates they have in such lands and tenements, have continued their possessions in the same by three years or more, be not endangered by force of this statute.

31 ELIZ. C. 11.

pp. 22, 24. "No restitution upon any indictment of forcible entry, or holding with force, be made to any person or persons, if the person or persons so indicted hath had the occupation, or hath been in quiet possession by the space of three whole years together next before the day of such indictment so found, and his, her, or their estate or estates therein not ended nor determined; which the party indicted shall and may allege for stay of restitution, and restitution to stay until that be tried if the other will deny or traverse the same, and if the same allegation be tried against the same person or persons so indicted, then the same person or persons so indicted to pay such costs and damages to the other party as shall be assessed by the judge or justices before whom the same shall be tried; the same costs and damages to be recovered and levied as is usual for costs and damages contained in judgments upon other actions."

21 JAC. 1, c. 15.

pp. 22, 24. "Such judges, justices or justice of the peace, as by reason of any act or acts of parliament now in force are authorized and enabled upon inquiry to give restitution of possession unto tenants of any estate of freehold of their lands and tenements, which shall be entered upon with force, or from them withholden by force, shall by reason of this present act have the like and the same authority and ability from henceforth (upon indictment of such forcible entries, or forcible withholdings before them duly found) to give like restitution of possession unto tenants for terms of years, tenants by copy of court roll, guardians by knight service, tenants by elegit, statute

merchant and staple of lands or tenements by them so holden which shall be entered upon by force, or holden from them by force."

### THE STATUTE OF FRAUDS.

29 CAR. 2, c. 3, s. 3.

"No leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall at any time after the said four and twentieth day of June be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law. pp. 50, 51.

11 GEO. 2, c. 19, ss. 16, 17.

S. 16. And whereas landlords are often great sufferers by tenants running away in arrear, and not only suffering the demised premises to lie uncultivated without any distress thereon, whereby their landlords or lessors might be satisfied for the rent arrear, but also refusing to deliver up the possession of the demised premises, whereby the landlords are put to the expense and delay of recovering in ejectment; be it further enacted by the authority aforesaid, that from and after the said twenty-fourth day of June, one thousand seven hundred and thirty-eight, if any tenant holding any lands, tenements, or hereditaments, at a rack-rent, and where the rent reserved shall be full three-fourths of the yearly value of the demised premises, who shall be in arrear for one year's rent, shall desert the demised premises, and leave the same uncultivated or unoccupied so as no sufficient distress can be had to countervail the arrears of rent; it shall and may be lawful to and for two or more justices of the peace of the county, riding, division, or place (having no interest in the demised premises) at the request of the lessor or landlord, lessors or landlords, or his, her, or their bailiff or receiver, to go upon and view the same, and to affix, or cause to be affixed, on the most notorious part p. 5.  
pp. 283, 284.

of the premises notice in writing what day (at the distance of fourteen days at least) they will return to take a second view thereof; and if upon such second view the tenant, or some person on his or her behalf, shall not appear, and pay the rent in arrear, or there shall not be sufficient distress upon the premises; then the said justices may put the landlord or landlords, lessor or lessors, into the possession of the said demised premises; and the lease thereof to such tenant, as to any demise therein contained only, shall from thenceforth become void.

p. 284. S. 17. Provided always that such proceedings of the said justices shall be examinable in a summary way for the next justice or justices of assize of the respective counties in which such lands or premises lie; and if they lie in the City of London or County of Middlesex, by the judges of the courts of Queen's Bench or Common Pleas; and if in the counties palatine of Chester, Lancaster, or Durham, then before the judges thereof; and if in Wales, then before the courts of grand sessions respectively; who are hereby respectively empowered to order restitution to be made to such tenant, together with his or her expenses and costs, to be paid by the lessor or landlord, lessors or landlords, if they shall see cause for the same; and in case they shall affirm the act of the said justices, to award costs not exceeding five pounds for the frivolous appeal.

14 GEO. 3, c. 78, s. 83.

p. 95. S. 83. "And in order to deter and hinder ill-minded persons from wilfully setting their house or houses, or other buildings on fire, with a view of gaining to themselves the insurance money, whereby the lives and fortunes of many families may be lost or endangered;" be it further enacted by the authority aforesaid, That it shall and may be lawful to and for the respective governors or directors of the several insurance offices for insuring houses or other buildings against loss by fire, and they are thereby authorized and required, upon the request of any person or persons interested in, or entitled unto, any house or houses or other buildings which may hereafter be burnt down, demolished, or damaged by fire, or upon any

grounds of suspicion that the owner or owners, occupier or occupiers, or other person or persons who shall have insured such house or houses, or other buildings, have been guilty of fraud, or of wilfully setting their house or houses or other buildings on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating, or repairing such house or houses, or other buildings so burnt down, demolished, or damaged by fire; unless the party or parties claiming such insurance money shall, within sixty days next after his, her, or their claim is adjusted, give sufficient security to the governors or directors of the insurance office where such house or houses, or other buildings are insured, that the same insurance money shall be laid out and expended as aforesaid; or unless the said insurance money shall be, in that time, settled and disposed of to and amongst all the contending parties, to the satisfaction and approbation of such governors or directors of such insurance office respectively.

57 GEO. 3, c. 52.

Whereas by an act of parliament passed in the eleventh year of the reign of his late majesty King George the Second, intituled, An act for the more effectual securing the payments of rents, and preventing frauds by tenants, it is amongst other things enacted, that from and after the twenty-fourth day of June, one thousand seven hundred and thirty-eight, if any tenant holding any lands, tenements, or hereditaments at a rack rent, or where the rent reserved should be full three-fourths of the yearly value of the demised premises, who should be in arrear for one year's rent, should desert the demised premises, and leave the same uncultivated or unoccupied, so as no sufficient distress could be had to countervail the arrears of rent, it should and might be lawful to and for two or more justices of the peace of the county, riding, division, or place (having no interest in the demised premises) at the request of the lessor or landlord, lessors or landlords, or his, her, and their bailiff or receiver, to go upon and view the same, and to affix or cause to be affixed on the most notorious part of the premises notice in writing what day (at the distance of fourteen days at least) they would return to take a second view thereof; and if

pp. 5, 283.

upon such second view the tenant, or some person on his or her behalf, should not appear and pay the rent in arrears, or there should not be sufficient distress upon the premises, then the said justices might put the landlord or landlords, lessor or lessors, into the possession of the said demised premises; and the lease thereof to such tenant, as to any demise therein contained only, should from thenceforth become void: And whereas it is expedient, for the due protection of the interest of landlords, that so much of the said act as requires a tenant to be in arrear for one year's rent should be altered, and that the provisions of the said act should be extended to tenancies where no right of entry in case of non-payment is reserved to the landlord; be it therefore enacted, by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act, the provisions, powers, and remedies by the said recited act given to lessors and landlords in case of any tenant deserting the demised premises and leaving the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, shall be extended to the case of tenants holding any lands, tenements, or hereditaments at a rack rent, or where the rent reserved shall be full three-fourths of the yearly value of the demised premises, and who shall be in arrear for one half-year's rent (instead of for one year's as in the said recited act is provided and enacted), and who shall hold such lands and tenements or hereditaments under any demise or agreement either written or verbal, and although no right or power of re-entry be reserved or given to the landlord in case of non-payment of rent, who shall be in arrear for one half-year's rent, instead of for one year as in the said recited act is provided and enacted.

59 GEO. 3, c. 12, ss. 17, 24, 25.

S. 17. And be it further enacted that all buildings, lands, and hereditaments which shall be purchased, hired, or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority and for any of the purposes of this



Act, shall be conveyed, demised and assured to the churchwardens and overseers of the poor of every such parish respectively, and their successors, in trust for the parish; and such churchwardens and overseers of the poor and their successors shall and may, and they are hereby empowered to accept, take and hold, in the nature of a body corporate for and on behalf of the parish all such buildings, lands and hereditaments, and also all other buildings, lands and hereditaments belonging to such parish; and in all actions, suits, indictments and other proceedings for or in relation to any such buildings, land and hereditament, or the rent thereof, or for or in relation to any other buildings, lands or hereditaments belonging to such parish, or the rent thereof, and in all actions and proceedings upon or in relation to any bond to be given for the faithful execution of the office of an assistant overseer, it shall be sufficient to name the churchwardens and overseers of the poor for the time being, describing them as the churchwardens and overseers of the poor of the parish for which they shall act, and naming such parish; and no action or suit, indictment or other proceeding shall cease, abate, or be discontinued, quashed, defeated, or impeded by the death of the churchwardens and overseers named in such proceeding, or the deaths or death of any of them, or by their removal or the removal of any of them from, or the expiration of their respective offices. p. 180.

S. 24. And whereas difficulties have frequently arisen, and considerable expenses have sometimes been incurred, by reason of the refusal of persons who have been permitted to occupy, or who have intruded themselves into parish or town houses, or other tenements or dwellings built or provided for the habitation of the poor or otherwise belonging to such parishes, to deliver up the possession of such houses, tenements or dwellings, when thereto required; and it is expedient to provide a remedy for the same; be it further enacted, that if any person who shall have been permitted to occupy any parish or town house, or any other tenement or dwelling belonging to or provided by or at the charge of any parish, for the habitation of the poor thereof, or who shall have un- pp. 6, 181, 182.

lawfully intruded himself or herself into any such house, tenement or dwelling, or into any house, tenement or hereditament belonging to such parish, shall refuse or neglect to quit the same, and deliver up the possession thereof to the churchwardens and overseers of the poor of any such parish, within one month after notice and demand in writing for that purpose, signed by such churchwardens and overseers, or the major part of them, shall have been delivered to the person in possession, or in his or her absence affixed to some notorious part of the premises, it shall be lawful for any two of his majesty's justices of the peace, upon complaint to them made by one or more of the churchwardens and overseers of the poor of the parish, in which any such house, tenement or dwelling shall be situated, to issue their summons to the person against whom such complaint shall be made, to appear before such justices at a time and place to be appointed by them, and to cause such summons to be delivered to the party against whom the complaint shall be made, or in his or her absence to be affixed on the premises seven days at the least before the time appointed for hearing such complaint; and such justices are hereby empowered and required, upon the appearance of the defendant, or upon proof on oath that such summons hath been delivered or affixed as is hereby directed, to proceed to hear and determine the matter of such complaint, and if they shall find and adjudge the same to be true, then by warrant under their hands and seals to cause possession of the premises in question to be delivered to the churchwardens and overseers of the poor of the parish or to some of them.

S. 25. And be it further enacted, that if any person to whom any land appropriated, purchased or taken under the authority of this act for the employment of the poor of any parish, or to whom any other lands belonging to such parish or to the churchwardens and overseers thereof, or to either of them, shall have been let for his or her own occupation, shall refuse to quit and deliver up the possession thereof to the churchwardens and overseers of the poor of such parish, at the expiration of the term for which the same shall have been

demised or let to him or her; or if any person or persons shall unlawfully enter upon, or take or hold possession of any such land, or any other land or hereditaments belonging to such parish or to the churchwardens and overseers or to either of them, it shall be lawful for such churchwardens and overseers of the poor, or any of them, after such notice and demand of possession as is by this act directed in the case of parish houses, to exhibit a complaint against the person or persons in possession of such land, before two of his majesty's justices of the peace, who are hereby authorised and required to proceed thereon, and to hear and determine the matter thereof, and if they shall find and adjudge the same to be true, to cause possession of such land to be delivered to the churchwardens and overseers of the poor, or some of them, in such and the like course and manner as are by this act directed with regard to parish houses.

2 & 3 WILL. 4, c. 42.

Whereas in parishes inclosed under acts of parliament there are in many cases allotments made for the benefit of the poor, chiefly with a view to fuel, which are now comparatively useless and unproductive: And whereas it would tend much to the welfare and happiness of the poor if those allotments could be let at a fair rent, and in small portions, to industrious cottagers of good character, while the distribution of fuel might be augmented by appropriating the said rents to the purchase of an additional quantity; be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same, That it shall and may be lawful for the trustees of the said allotments, together with the churchwardens and overseers of the poor, in parish vestry assembled, and they are hereby required, to let portions of any such allotment, not less than one-fourth of a statute acre and not exceeding one such acre, to any one individual according to their discretion, as a yearly occupation from Michaelmas to Michaelmas (and at such rent as land of the same quality is usually let for in the said parish) to such indus- p. 182.

trious cottagers of good character, being day labourers or journeymen legally settled in the said parish, and dwelling within or near its bounds, as shall apply for the same in the manner hereinafter mentioned.

S. 2. Provided also, and be it further enacted, That the person hiring the same shall be held bound to cultivate it in such manner as shall preserve the land in a due state of fertility.

S. 3. And be it further enacted, That for the purpose of carrying this act into effect a vestry shall be held in the first week in September in every year, of which ten days' notice shall be given in the usual manner, at which vestry the trustees of the said allotments may attend and vote, if they shall so think fit, and at which vestry, or some adjournment thereof, any industrious cottager of good character who may desire to rent such portion of land as aforesaid may apply for the same ; and the said vestry are hereby required, taking into consideration the character and circumstances of the applicant, to determine the case, either by rejecting his application, or by making an order that he shall be permitted to occupy such portion of the poor allotment, being not less than one-fourth of a statute acre, nor exceeding one such acre, as the said vestry in their discretion shall determine, and upon the terms hereinbefore enacted ; and the said order of vestry shall be held to all intents and purposes to be sufficient title and authority to such applicant to enter into the occupation of such land at the time therein appointed.

S. 4. Provided always, and be it further enacted, That the rent shall be reserved and payable to the churchwardens and overseers of the poor, on behalf of the vestry, in one gross sum for the whole year, and shall be paid to one or either of them at the end of the year's occupation.

S. 5. And be it further enacted, That if the rent of such portion of land shall at any time be four weeks in arrear, or if at the end of any one year of occupation it shall be the opinion of the vestry that the land has not been duly cultivated, so as to fulfil the useful and benevolent purposes of this act, then and in such case the churchwardens and overseers of the poor,

or any or either of them with the consent of the vestry, may serve a notice to quit upon the occupier of such portion of land ; Whereupon the said occupier shall deliver up possession of the same to the churchwardens and overseers aforesaid, or any or either of them, within one week after the said notice has been duly served upon him.

S. 6. And be it further enacted, That if any person to whom such portion of land as aforesaid shall have been let, for his or her own occupation, shall refuse to quit and to deliver up possession thereof when thereto required according to the terms of this act, or if any other person or persons shall unlawfully enter upon or take or hold possession of any such land, it shall be lawful for the churchwardens and overseers of the poor, or any or either of them, to exhibit a complaint against the person so in possession of such land before two of his majesty's justices of the peace, who are hereby authorized and required to issue a summons, under their hands and seals, to the person against whom such complaint shall be made, to appear before them at a time and place appointed therein ; and such justices are hereby required and empowered upon the appearance of the defendant before them, or upon proof on oath that such summons has been duly served upon him, or left at his usual place of residence, or if there should have been any difficulty in finding such usual place of residence, then upon proof on oath of such difficulty, and that such summons has been affixed on the door of the parish church of the said parish in which such land is situated, and in any extra parochial place on some public building or other conspicuous place therein, to proceed to hear and determine the matter of such complaint, and if they shall find and adjudge the same to be true, then by warrant under their hands and seals to cause possession of the land in question to be delivered to the churchwardens and overseers of the poor, or to some of them.

S. 7. And be it further enacted, That all arrears of rent for the said portions of land shall be recoverable by the churchwardens and overseers of the poor, or any of them on behalf of the vestry, by application to two of his majesty's justices of the peace in petty sessions assembled who shall thereupon

summons the party complained against, and after hearing what he has to allege, should they find any rent to be due, they are required to issue a warrant under their hands and seals to levy the same upon the goods and chattels of the person from whom the said rents shall be due and owing.

S. 8. And be it further enacted, That the rent of the said portions of land shall be applied by the vestry in the purchase of fuel to be distributed in the winter season among the poor parishioners legally settled and resident in or near the said parish.

S. 9. And be it further enacted, That if any of the said allotments shall be found to lie at an inconvenient distance from the residences of the cottagers, it shall be lawful for the vestry, by an order made to that effect, to let such allotment or any part thereof, for the best rent that can be procured for the same, and to hire in lieu thereof, for the purposes of this act, land of equal value more favourably situated.

S. 10. And be it further enacted, That no habitation shall be erected on the portions of land demised under this act, either at the expense of the parish or by the individuals renting the same.

S. 11. And whereas by two acts of the first and second years of the reign of his present majesty intituled, An act to amend an act of the fifty-ninth year of his majesty King George the Third, for the relief and employment of the poor, and the other intituled, An act to enable the churchwardens and overseers to inclose lands belonging to the crown, for the benefit of poor persons residing in the parish in which such crown land is situated, power is given under certain restrictions to inclose any quantity not exceeding fifty acres of waste land and crown land respectively, for the use and benefit of the poor; be it further enacted, That in any parish where such inclosure shall exist or shall hereafter take place, or where land shall in any other manner be found appropriated for the general benefit of the poor of any parish, then and in such cases the powers and provisions of this act shall be held to apply in so far as the same may be found applicable.

## STATUTE OF LIMITATIONS.

3 &amp; 4 WILL 4, c. 27.

S. 1. An Act for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto [24 July, 1833]: Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in the present Parliament assembled and by the authority of the same, that the words and expressions hereinafter mentioned which in their ordinary signification have a more confined or a different meaning shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows (that is to say): the word "land" shall extend to manors, messuages and all other corporeal hereditaments whatsoever, and also to tithes other than tithes belonging to a spiritual or eleemosynary corporation sole, and also to any share, estate or interest in them or any of them whether the same shall be a freehold or chattel interest and whether freehold or copyhold or held according to any other tenure; and the word "rent" shall extend to all heriots and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim shall mean any person by, through or under or by the act of whom the person so claiming became entitled to the estate or interest claimed as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming or some person through whom he claims became entitled as lord by escheat; and the word "person" shall extend to a body politic corporate or collegiate, and to a class of creditors or other persons, as well as an individual; and every word importing the singular number only shall extend and be applied to several

pp. 206, 212,  
221, 225.

persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

pp. 152, 196,  
199, 200, 202,  
203, 207, 220.

S. 3. And be it further enacted, That in the construction of this Act the right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned (that is to say): when the person claiming such land or rent or some person through whom he claims shall in respect of the estate or interest claimed have been in possession or in receipt of the profits of such land or in receipt of such rent and shall while entitled thereto have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed or otherwise assured by any instrument (other than a will) to him or some person through whom he claims by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid or the person through whom he claims became entitled to such possession or receipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder or other future estate or interest, and no person shall have obtained the possession or receipt of the profits



of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent or the person through whom he claims shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.

S. 4. Provided always that when any right to make an entry or distress, or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession as if no such forfeiture or breach of condition had happened. pp. 202, 203.

S. 6. And be it further enacted that for the purposes of this act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration. pp. 152, 200.

S. 7. And be it further enacted that when any person shall be in possession or in receipt of the profits of any land or in receipt of any rent as tenant at will the right of the person entitled subject thereto, or of the person through whom he claims to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy at which time such tenancy shall be deemed to have determined: Provided always that no mortgagor or cestui que trust shall be deemed to be a tenant at will within the meaning of this clause to his mortgagee or trustee. pp. 202, 203, 204, 205, 207, 216.

pp. 202, 205,  
207.

S. 8. And be it further enacted, That when any person shall be in possession or in receipt of the profits of any land or in receipt of any rent as tenant from year to year or other period without any lease in writing, the right of the person entitled subject thereto or of the person through whom he claims to make an entry or distress or to bring an action to recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other periods or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).

pp. 202, 206,  
207.

S. 9. And be it further enacted, That when any person shall be in possession or in receipt of the profits of any land or in receipt of any rent by virtue of a lease in writing by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent subject to such lease or of the person through whom he claims to make an entry or distress or to bring an action after the determination of such lease shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid, and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

p. 207.

S. 10. And be it further enacted, That no person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon.

p. 208.

S. 11. And be it further enacted, That no continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action :

p. 178.

S. 12. And be it further enacted, That when any one or more of several persons entitled to any land or rent as coparceners, joint tenants or tenants in common shall have been

in possession or receipt of the entirety or more than his or their undivided share or shares of such land or of the profits thereof or of such rent for his or their own benefit or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them.

S. 13. And be it further enacted, that when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land or to the receipt of any rent shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir : p. 209.

S. 14. Provided always and be it further enacted, That when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing signed by the person in possession or in receipt of the profits of such land or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person or any person claiming through him to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued at and not before the time at which such acknowledgment or the last of such acknowledgments if more than one was given : pp. 197, 209, 220.

S. 15. Provided also and be it further enacted that when no such acknowledgment as aforesaid shall have been given before the passing of this Act and the possession or receipt of the profits of the land or the receipt of the rent shall not at the time of the passing of this Act have been adverse to the right or title of the person claiming to be entitled thereto, then such person or the person claiming through him may notwithstanding the period of twenty [now 12] years hereinbefore

limited shall have expired make an entry or distress or bring an action to recover such land or interest at any time within five years next after the passing of this Act.

p. 210.

S. 18. Provided always, and be it further enacted, that when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress or to bring an action to recover such land or rent beyond the said period of [ten] years next after the right of such person to make an entry or distress or to bring an action to recover such land or rent shall have first accrued, or the said period of [six] years next after the time at which such person shall have died shall be allowed by reason of any disability of any other person.

S. 19. And be it further enacted, that no part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of His Majesty), shall be deemed to be beyond seas within the meaning of this Act.

pp. 201, 211.

S. 20. And be it further enacted, that when the right of any person to make an entry or distress or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility in reversion, remainder, or otherwise in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him to recover such land or rent in respect of such other estate, interest, right or possibility unless in the meantime such land or rent shall have been recovered by some person entitled to an estate interest or right which have been limited or taken effect after or in defeasance of such estate or interest in possession.

S. 21. That when the right of a tenant in tail of any land or rent to make an entry or distress or to bring an action to recover the same shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress or action shall be made or brought by any person claiming any estate, interest or right which such tenant in tail might lawfully have barred. pp. 212, 213.

S. 22. That when a tenant in tail of any land or rent entitled to recover the same, shall have died before the expiration of the period hereinbefore limited which shall be applicable in such case, for making an entry or distress or bringing an action to recover such land or rent, no person claiming any estate, interest or right which such tenant in tail might lawfully have barred shall make an entry or distress or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action. p. 213.

S. 24. And be it further enacted that after the said thirty-first day of December one thousand eight hundred and thirty-three no person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which by virtue of the provisions hereinbefore contained he might have made an entry or distress or brought an action to recover the same respectively if he had been entitled at law to such estate, interest or right in or to the same as he shall claim therein in equity. p. 217.

S. 25. Provided always and be it further enacted that when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que* trust or any person claiming through him to bring a suit against the trustee or any person claiming through him to recover such land or rent shall be deemed to have first accrued according to the meaning of this Act at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him. pp. 214, 215, 216, 220, 226.

S. 26. And be it further enacted that in every case of a con-

p. 217. cealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered, provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents or for setting aside any conveyance of such lands or rents on account of fraud against any *bond fide* purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed.

p. 217. S. 27. Provided always that nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief on the ground of acquiescence or otherwise to any person whose right to bring a suit may not be barred by virtue of this Act.

pp. 222, 223. S. 29. Provided always that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital or other spiritual or eleemosynary corporation sole, to make an entry or distress or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole or of his predecessor to make such entry or distress or bring such action or suit shall have first accrued ; (that is to say) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed and six years after a third person shall have been appointed thereto, if the times of such two incumbrances and such term of six years taken together shall amount to the full period of sixty years ; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will with the time of the holding of such two persons and such six years make up the full period of sixty years ; and after the said 31st of December, 1833, no

such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period.

S. 30. That after the said 31st of December, 1833, no person shall bring any *quare impedit* or other action or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned : (that is to say) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person or of some person through whom he claims, if the times of such incumbrances taken together shall amount to the full period of sixty years ; and if the times of such incumbrances shall not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbrances will make up the full period of sixty years. p. 223.

S. 31. Provided always that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his majesty or the ordinary by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid ; but when a clerk shall have been presented by his majesty on the avoidance of a benefice in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this Act, be deemed a continuation of the incumbency of the clerk so made bishop. p. 224.

S. 32. That in the construction of this Act every person claiming a right to present to or bestow any ecclesiastical benefice as patron thereof by virtue of any estate, interest, or right which the owner of an estate tail in the advowson might have barred shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any *quare impedit* action or suit shall be limited accordingly. p. 224.

S. 33. Provided always, that after the said 31st of December, 1833, no person shall bring any *quare impedit* or other action or any suit to enforce a right to present to or bestow any p. 224.

ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice, adversely to the right of presentation or gift of such person, or of some other person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right held or derived under the same title.

p. 224.

S. 34. That at the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished.

p. 197.

S. 35. That the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this Act.

p. 93.

S. 36. That no writ of right patent, writ of right quia dominus remisit curiam, writ of right in capite, writ of right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationabilibus divisis, writ of right of ward, writ de consuetudinibus et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de theolonio, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formedon in descender, in remainder, or in reverter, writ of assize of novel disseisin nuisance, darrein presentment, juris utrum, or mort d'ancestor, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post; writ of entry sur intrusion, writ of entry sur alienation, dum fuit non compos mentis, dum fuit infra



ætatem, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui ante divortium ; writ of entry sur abatement, writ of entry quare ejecit infra terminum, or ad terminum qui præteriit, or causa matrimonii prælocuti ; writ of aiel, besaiel, tresaiel, cosinage or nuper obiit ; writ of waste, writ of partition, writ of desceit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartæ, writ of curia claudenda, or writ per quæ servitia, and no other action real or mixed (except a writ of right of dower, or writ of dower unde nihil habet, or a quare impedit, or an ejectment) and no plaint in the nature of any such writ or action (except a plaint for freebench or dower) shall be brought after the 31st of December, 1834.

S. 39. That no descent, cast, discontinuance, or warranty which may happen or be made after the said 31st of December, 1833, shall toll or defeat any right of entry or action for the recovery of land.

S. 41. That after the said 31st of December, 1833, no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit.

S. 42. That after the said 31st of December, 1833, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent : Provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to subsequent mortgage or other incumbrance on the same land, the person entitled to such subse-

quent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.

S. 43. That after the said 31st of December, 1833, no person claiming any tithes, legacy, or other property for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same but within the period during which he might bring such action or suit at law or in equity.

S. 44. Provided always, that this act shall not extend to Scotland, and shall not, so far as it relates to any right to permit to or bestow any church, vicarage, or other ecclesiastical benefice, extend to Ireland.

#### AN ACT FOR THE AMENDMENT OF THE LAW OF INHERITANCE.

3 & 4 WILL. 4, c. 106.

S. 1. That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows (that is to say):—  
“Land” shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law or according to the custom of gavelkind or borough English or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, right, titles and interests or

any of them shall be in possession, reversion, remainder or contingency; and the word "purchaser" shall mean the person who last acquired the land otherwise than by descent or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; and the word "descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue; and the "descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor; and the expression "the person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or receipt of the rents and profits thereof; and the word "assurance" shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

S. 2. That in every case descent shall be traced from the purchaser, and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this Act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall have been proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same. p. 164.

S. 3. That when any land shall have been devised by any testator who shall die after the 31st day of December, 1833, p. 165. to the heir or to the person who shall be the heir of such

testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited by any assurance executed after the said 31st day of December, 1833, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof.

p. 166.

S. 4. That when any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said 31st day of December, 1833, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said 31st day of December, 1833, then and in any such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land.

p. 166.

S. 5. That no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent.

p. 166.

S. 6. That every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue.

p. 167.

S. 7. That none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of

her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed ; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.

S. 8. That where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person in preference to the mother of a less remote male paternal ancestor, or her descendants ; and where there shall be a failure of male paternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person in preference to the mother of a less remote male maternal ancestor, and her descendants. p. 167

S. 9. That any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir, and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother. p. 167.

S. 10. That when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the 31st of January, 1834. p. 167.

p. 167. S. 11. That this act shall not extend to any descent which shall take place on the death of any person who shall die before the said 1st of January, 1834.

S. 12. That where any assurance executed before the said 1st of January, 1834, or the will of any person who shall die before the same 1st of January, 1834, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this act had not been made shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said 1st of January, 1834.

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#### THE WILLS ACT, 1837.

7 WILL. 4 & 1 VICT. C. 26.

S. 1. BE it enacted that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows: (that is to say) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will, or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an act passed in the twelfth year of the reign of King Charles the Second intituled "An Act for taking away the Court of wards and liveries and tenures in capite, and by knights service, and purveyance, and for settling a revenue upon his Majesty in lieu thereof" or by virtue of an act passed in the Parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the Court of wards and liveries and tenures in capite and by knight's service," and to any other testamentary disposition: and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary

freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

S. 2. And be it further enacted that an Act passed in the thirty-second year of the reign of King Henry the Eighth, intituled "the Act of wills, wards and primer seisins, whereby a man may devise two parts of his land;" and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth intituled "the Bill concerning the explanation of wills;" and also an Act passed in the Parliament of Ireland in the tenth year of the reign of King Charles the First intituled "an Act how lands, tenements, etc. may be disposed by will or otherwise, and concerning wards and primer seisins;" and also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second, intituled "an Act for prevention of frauds and perjuries;" and of an Act passed in the Parliament of Ireland in the seventh year of the reign of King William the Third intituled "an Act for prevention of frauds and perjuries," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an Act passed in the fourth and fifth years of the

reign of Queen Anne, intituled "an Act for the amendment of the law and the better advancement of justice ;" and of an Act passed in the Parliament of Ireland in the sixth year of the reign of Queen Anne, intituled "an Act for the amendment of the law and the better advancement of justice," as relates to witnesses to nuncupative wills ; and also so much of an Act passed in the fourteenth year of the reign of King George the Second, intituled "an Act to amend the law concerning common recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled 'an Act for the prevention of frauds and perjuries,' as relates to estates *pur autre vie* : " and also an Act passed in the twenty-fifth year of the reign of King George the Second, intituled "an Act for avoiding and putting an end to certain doubts and questions relating to the attestation of wills and codicils concerning real estates in that part of Great Britain called England, and in his Majesty's colonies and plantations in America ;" and also an Act passed in the Parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled "an Act for the avoiding and putting an end to certain doubts and questions relating to the attestations of wills and codicils concerning real estate ;" and also an Act passed in the fifty-fifth year of the reign of King George the Third, intituled "an Act to remove certain difficulties in the dispositions of copyhold estates by will," shall be and the same are hereby repealed, except so far as the same Acts, or any of them respectively relate to any wills or estates *pur autre vie* to which this Act does not extend.

pp. 64, 153,  
187.

S. 3. It shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator ; and that the power hereby given shall extend to all real estate of the nature of customary, freehold or tenant right, or customary or copyhold, not-



withstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament, and also to all contingent, executory or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

S. 4. Provided always, and be it further enacted that, where any real estate of the nature of customary freehold, or tenant right, or customary or copyhold, might by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties,

fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator ; Provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fines and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will ; all which stamp duties, fees, fine or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

p. 152.

S. 5. And be it further enacted, that when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor ; and when any trusts are declared by the will of such real estate it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will ; and when any such real

estate could not have been disposed of by will if this Act had not been made, the same fine, heriot, dues, duties and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall, as against the devisee of such estate, have the same remedy for recovering and enforcing such fine, heriot, dues, duties and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of descent.

S. 6. And be it further enacted, that if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, p. 163. customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

S. 7. And be it further enacted, that no will made by any p. 154. person under the age of twenty-one years shall be valid.

S. 8. Provided also, and be it further enacted, that no will made by any married woman shall be valid except such a will p. 154. as might have been made by a married woman before the passing of this Act.

S. 9. And be it further enacted, that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say) it shall be signed "*at the foot or end thereof*" by the testator, or by some person in his presence p. 154. and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall

attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

p. 155. S. 10. And be it further enacted, that no appointment made by will in exercise of any power shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

p. 154. S. 13. And be it further enacted, that every will executed in manner hereinbefore required shall be valid without any other publication thereof.

p. 154. S. 14. And be it further enacted, that if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

p. 155. S. 15. And be it further enacted, that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment of, or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such persons attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

p. 155. S. 16. And be it further enacted, that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor,

whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

S. 17. And be it further enacted, that no person shall, on account of his being an executor of a will, be incompetent to be p. 155 admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

S. 18. And be it further enacted, that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment when the p. 155. real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor or administrator, or the person entitled as his or her next of kin, under the statute of distribution).

S. 19. And be it further enacted, that no will shall be re- p. 155 voked by any presumption of an intention on the ground of an alteration in circumstances.

S. 20. And be it further enacted, that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid ; or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is here- p. 156. inbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

S. 21. And be it further enacted, that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall p. 156. not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will ; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to

such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration and written at the end or some other part of the will.

p. 156. S. 22. And be it further enacted, that no will or codicil or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

p. 157. S. 23. And be it further enacted, That no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

p. 153. S. 24. And be it further enacted, that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

p. 157. S. 25. And be it further enacted, that unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

p. 157. S. 26. And be it further enacted, that a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or other-

wise described in a general manner and any other general devise which would describe a customary, copyhold or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

S. 27. And be it further enacted, that a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), p. 158. which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will.

S. 28. And be it further enacted, that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee p. 159. simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

S. 29. And be it further enacted, that in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of p. 159. issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue,

unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise; Provided that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

p. 160.

S. 30. And be it further enacted, that where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

p. 160.

S. 31. And be it further enacted, that where any real estate shall be devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

p. 160.

S. 32. And be it further enacted, that when any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened



immediately after the death of the testator, unless a contrary intention shall appear by the will.

S. 33. And be it further enacted, that where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of p. 160. such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time at the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

S. 34. And be it further enacted, that this Act shall not extend to any will made before the first day of January, One thousand Eight hundred and thirty-eight, and that every will re-executed or re-published or revived by any codicil, shall for p. 161. the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, re-published, or revived; and this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, One thousand Eight hundred and thirty-eight.

S. 35. And be it further enacted that this Act shall not extend to Scotland.

7 WILL. 4 & 1 VICT. c. 28.

An Act to amend 3 & 4 Will. 4, c. 27.

It shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said Act, to make an entry or bring an action at law or suit in equity p. 221. to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said Act notwithstanding.

## 1 &amp; 2 VICT. c. 74.

pp. 5, 281—  
283.

S. 1. From and after the passing of this Act, when and so soon as the term or interest of the tenant of any house, land or other corporeal hereditaments held by him at will or for any term not exceeding seven years, either without being liable to the payment of any rent or at a rent not exceeding the rate of twenty pounds a year, and upon which no fine shall have been reserved or made payable, shall have ended or shall have been duly determined by a legal notice to quit or otherwise, and such tenant, or (if such tenant do not actually occupy the premises or only occupy a part thereof) any person by whom the same or any part thereof shall be then actually occupied, shall neglect and refuse to quit and deliver up possession of the premises or such part thereof respectively, it shall be lawful for the landlord of the said premises or his agent to cause the person so neglecting or refusing to quit and deliver up possession to be served (in the manner hereinafter mentioned) with a written notice in the form set forth in the Schedule to this Act, signed by the said landlord or his agent, of his intention to proceed to recover possession under the authority and according to the mode prescribed in this Act; and if the tenant and occupier shall not thereupon appear at the time and place appointed, and show to the satisfaction of the justices hereinafter mentioned reasonable cause why possession should not be given under the provisions of this Act, and shall still neglect or refuse to deliver up possession of the premises or of such part thereof of which he is then in possession to the said landlord or his agent, it shall be lawful for such landlord or agent to give to such justices proof of the holding and of the end or other determination of the tenancy, with the time or manner thereof, and where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession, and upon proof of service of the notice, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the justices acting for the district, division, or place within the said premises or any part thereof shall be situate, in Petty Sessions assembled, or any

two of them, to issue a warrant under their hands and seals to the constables and peace officers of the district, division, or place within which the said premises or any part thereof shall be situate, commanding them, within a period to be therein named, not less than twenty-one nor more than thirty clear days from the date of such warrant, to enter (by force if needful) into the premises, and give possession of the same to such landlord or agent; Provided always, that entry upon any such warrant shall not be made on a Sunday, Good Friday, or Christmas Day, or at any time except between the hours of nine in the morning and four in the afternoon: Provided also, that nothing herein contained shall be deemed to protect any person on whose application and to whom any such warrant shall be granted from any action which may be brought against him by any such tenant or occupier, for or in respect of such entry and taking possession, where such person had not at the time of granting the same lawful right to the possession of the same premises: Provided also, that nothing herein contained shall affect any rights to which any person may be entitled as outgoing tenant by the custom of the country or otherwise.

S. 2. And be it enacted, that such notice of application intended to be made under this Act may be served either personally or by leaving the same with some person being in and apparently residing at the place of abode of the persons so holding over as aforesaid, and that the person serving the same shall read over the same to the person served or with whom the same shall be left as aforesaid, and explain the purport and intent thereof: Provided that if the person so holding over cannot be found, and the place of abode of such person shall either not be known or admission thereto cannot be obtained for serving such summons, the posting up of the said summons on some conspicuous part of the premises so held over shall be deemed to be good service upon such person. p. 282.

S. 3. And be it enacted, that in every case in which the person to whom any such warrant shall be granted had not at the time of granting the same lawful right to the possession of the premises, the obtaining of any such warrant as aforesaid p. 283.

shall be deemed a trespass by him against the tenant or occupier of the premises, although no entry shall be made by virtue of the warrant ; and in case any such tenant or occupier will become bound with two sureties as hereinafter provided, to be approved by the said Justices, in such sums as to them shall seem reasonable, regard being had to the value of the premises and to the probable costs of an action, to sue the person to whom such warrant was granted with effect and without delay, and to pay all the costs of the proceeding in such action in case a verdict shall pass for the defendant, or the plaintiff shall discontinue or not prosecute his action or become non-suit therein. Execution of the warrant shall be delayed until judgment shall have been given in such action of trespass ; and if upon the trial of such action of trespass a verdict shall pass for the plaintiff, such verdict and judgment thereupon shall supersede the warrant so granted, and the plaintiff shall be entitled to double costs in the said action of trespass.

p. 283.

S. 4. And be it enacted, that every such bond as hereinbefore mentioned shall be made to the said landlord or his agent at the costs of such landlord or agent, and shall be approved of and signed by the said justices ; and if the bond so taken be forfeited, or if upon the trial of the action for securing the trial of which such bond was given, the judge by whom it shall be tried shall not endorse upon the record in Court that the condition of the bond hath been fulfilled, the party to whom the bond shall have been so made may bring an action and recover thereon : Provided always, that the Court where such action as last aforesaid shall be brought may, by a rule of Court, give such relief to the parties upon such bond as may be agreeable to justice, and such rule shall have the nature and effect of a defeazance to such bond.

p. 283.

S. 5. And be it enacted, that it shall not be lawful to bring any action or prosecution against the said justices by whom such warrant as aforesaid shall have been issued, or against any constable or peace officer by whom such warrant may be executed, for issuing such warrant or executing the same respectively, by reason that the person on whose application

the same shall be granted had not lawful right to the possession of the premises.

S. 6. And be it enacted, that where the landlord at the time of applying for such warrant as aforesaid had lawful right to the possession of the premises, or of the part thereof so held over as aforesaid, neither the said landlord nor his agent, nor any other person acting in his behalf, shall be deemed to be a trespasser by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under the authority of this Act, but the party aggrieved may if he think fit bring an action on the case for such irregularity or informality, in which the damage alleged to be sustained thereby shall be specially laid, and may recover full satisfaction for such special damage with costs of suit : provided, that if the special damage so laid be not proved, the defendant shall be entitled to a verdict, and that if proved and assessed by the jury at any sum not exceeding five shillings, the plaintiff shall recover no more costs than damages, unless the judge before whom the trial shall have been held shall certify upon the back of the record that in his opinion full costs ought to be allowed. p. 283.

S. 7. And be it enacted, that in construing this Act the word "premises" shall be taken to signify lands, houses, or other corporeal hereditaments ; and that the word "person" shall be taken to comprehend a body politic, corporate, or collegiate as well as an individual, and that every word importing the singular number shall, where necessary to give full effect to the enactments herein contained, be deemed to extend and be applied to several persons or things, as well as one person or thing ; and that every word importing the masculine gender shall where necessary extend and be applied to a female as well as a male ; and that the term "landlord" shall be understood as signifying the person entitled to the immediate reversion of the premises, or, if the property be held in joint-tenancy, coparcenary, or tenancy in common, shall be understood as signifying any one of the persons entitled to such reversion ; and that the word "agent" shall be taken to signify any person usually employed by the landlord in the letting of the premises, or in the collection of the rents thereof, p. 283.

or specially authorised to act in the particular matter by writing under the hand of such landlord.

1 & 2 VICT. c. 110, s. 11.

pp. 145, 147.

And whereas the existing law is defective in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law ; be it therefore further enacted, that it shall be lawful for the sheriff or other officer to whom any writ of elegit or any precept in pursuance thereof, shall be directed, at the suit of any person, upon any judgment which at the time appointed for the commencement of this act shall have been recovered or shall be thereafter recovered in any action in any of her majesty's superior courts at Westminster, to make and deliver execution unto the party in that behalf suing of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued ; or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might without the assent of any other person exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of elegit is sued out ; which lands, tenements, rectories, tithes, rents, and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the court out of which such execution shall have been sued out as a tenant by elegit is now subject to in a court of equity : Provided always, that such party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution, shall be liable and is hereby required

to make, perform, and render to the lord of the manor or other person entitled all such and the like payments and services as the person against whom such execution shall be issued would have been bound to make, perform, and render in case such execution had not issued; and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied: Provided also, that as against purchasers, mortgagees, or creditors who shall have become such before the time appointed for the commencement of this act, such writ of elegit shall have no greater or other effect than a writ of elegit would have had in case this act had not passed.

3 & 4 VICT. c. 77.

S. 19. And for the more speedy and effectual recovery of the possession of any premises belonging to any grammar school which the master who shall have been dismissed as aforesaid, or any person who shall have ceased to be master, shall hold over after his dismissal or ceasing to be master, except under such assignment as may have been made under the provisions of this act, the term of such assignment, being still unexpired, and the premises being in the actual occupation of the master, so dismissed or ceased to be master, be it enacted, that when and as often as any master holding any schoolroom, school-house, or any other house, land or tenement, by virtue of his office or as tenant or otherwise under the trustees of the said grammar school, except on lease for a term of years still unexpired shall have been dismissed as aforesaid, or shall have ceased to be master, and such master, or (if he shall not actually occupy the premises or shall only occupy a part thereof) any person by whom the same or any part thereof shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises or of such part thereof respectively, except such as are hereinbefore excepted, within the space of three months after such dismissal or ceasing to be master, it shall be lawful for justices of the peace acting for the

pp. 5, 284.

district or division in which such premises or any part thereof are situated, in petty sessions assembled, or any two of them, and they are hereby required, on the complaint of the said trustees or their agents, under the production of an order of the court of chancery declaring such master to have been duly dismissed or have ceased to be master to issue a warrant under their hands and seals, to the constables and peace officers of the said district or division, commanding them, within a period to be therein named, not less than ten nor more than twenty-one clear days from the date of such warrant, to enter into the premises, and give possession of the same to the said trustees or their agents in such manner as any justices of the peace are empowered to give possession of any premises to any landlord or his agents under an act passed in the session of parliament held in the first and second years of the reign of her present majesty, intituled *An act to facilitate the recovery of possession of tenements after due determination of the tenancy.*

S. 20. Provided always, and be it enacted that nothing in this Act or the said recited Act shall extend or be construed to extend to enable any master so dismissed, or ceasing to be master as aforesaid to call in question the validity of such dismissal, provided that the same shall have proceeded from the persons authorized to order the same after such inquiries and by such mode of proceeding as required in that behalf, or to call in question the title of the trustees to possession of any premises of which such master shall have become possessed by virtue of his late office, or as tenant or otherwise under the trustees of the said grammar school for the time being.

### 3 & 4 VICT. c. 84, s. 13.

S. 13. That after the passing of this Act none of the police magistrates within the metropolitan police district shall be required to go upon any deserted lands, tenements or hereditaments for the purpose of viewing the same or affixing any notices thereon, or of putting the landlord or landlords, lessor or lessors, into the possession thereof, under the provisions of 11 Geo. 2, c. 19, intituled "an Act for the more effectual securing the payment of rents, and preventing frauds by



tenants," or of the 57 Geo. 3, c. 52, for altering the last recited Act, but that in every case within the metropolitan police district in which by the said Acts, or either of them, two justices are authorized to put the landlord or lessor into the possession of such deserted premises, it shall be lawful for one of the police magistrates, upon request of the lessor or landlord, or his or her bailiff or receiver, made in open court, and upon proof given to the satisfaction of such magistrate of the arrear of rent and desertion of the premises by the tenant as aforesaid, to issue his warrant, directed to one of the constables of the metropolitan police force, requiring him to go upon and view the premises, and to affix thereon the like notices as under the said Acts or either of them are required to be affixed by two justices of the peace; and upon the return of the warrant, and upon proof being given to the satisfaction of the magistrate before whom the warrant shall be returned that it has been duly executed, and that neither the tenant nor any person, on his or her behalf has appeared and paid the rent in arrear, and that there is not sufficient distress upon the premises, it shall be lawful for such magistrate to issue his warrant to a constable of the metropolitan police force, requiring him to put the landlord or lessor into the possession of the premises; and every constable to whom any such warrant shall be directed shall duly execute and return the same, subject to the provisions contained in 2 & 3 Vict., c. 47, intituled "an Act for further improving the police in and near the metropolis," as to the execution of warrants directed to constables of the metropolitan police force; and upon the execution of such second warrant the lease of the premises to such tenant, as to any demise therein contained only, shall thenceforth be void.

#### ACT TO AMEND THE LAW OF REAL PROPERTY.

8 & 9 VICT. c. 106.

S. 3. That a feoffment, made after the first day of October, One thousand Eight hundred and forty-five, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed; and that a partition, and an

exchange, of any tenements or hereditaments, not being copyhold, and a lease, required by law to be in writing, of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, and a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the said first day of October, One thousand Eight hundred and forty-five, shall also be void at law, unless made by deed: Provided always, that the said enactment so far as the same relates to a release or a surrender shall not extend to Ireland.

## 8 &amp; 9 VICT. C. 112.

p. 3.

S. 1. "Whereas the assignment of satisfied terms has been found to be attended with great difficulty, delay, and expence, and to operate in many cases to the prejudice of the persons justly entitled to the lands to which they relate"; Be it therefore enacted, that every satisfied term of years which, either by express declaration or by construction of law, shall upon the thirty-first day of December, One thousand Eight hundred and forty-five be attendant upon the inheritance or reversion of any lands, shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid, by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim and demand as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with, after the said thirty-first day of December, One thousand Eight hundred and forty-five, and shall for the purpose of such protection be considered in every court of law and of equity to be a subsisting term.

p. 4.

p. 4

S. 2. And be it enacted, that every term of years now subsisting or hereafter to be created, becoming satisfied after the said thirty-first day of December, One thousand

Eight hundred and forty-five, and which either by express declaration or by construction of law, shall after that day become attendant upon the inheritance or reversion of any lands, shall immediately upon the same becoming so attendant absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid.

S. 3. And be it enacted, that in the construction and for the purposes of this Act, unless there be something in the subject or context repugnant to such construction, the word "lands" shall extend to all freehold tenements and hereditaments, whether corporeal or incorporeal, and to all such customary land as will pass by deed, or deed and admittance and not by surrender, or any undivided part or share thereof respectively; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

#### AN ACT TO AMEND THE WILLS ACT.

15 & 16 VICT. c. 24.

p. 154

S. 1. Where by an Act passed in the first year of the reign of her majesty Queen Victoria, intituled "An Act for the Amendment of the Laws with respect to Wills," it is enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction: every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a

blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, either with or without a blank space intervening, or shall follow or be after or under or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side a page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it; nor shall it give effect to any disposition or direction inserted after the signature shall be made.

S. 2. The provisions of this Act shall extend and be applied to every will already made where administration or probate has not already been granted or ordered by a court of competent jurisdiction in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the ecclesiastical courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a court of competent jurisdiction, in consequence of the defective execution of such will.

S. 3. The word "will" shall in the construction of this Act be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the Act of the first year of the reign of her majesty Queen Victoria.

## COMMON LAW PROCEDURE ACT, 1852.

15 &amp; 16 VICT. c. 76.

S. 209. Every tenant to whom any writ in ejectment shall be delivered, or to whose knowledge it shall come, shall forthwith give notice thereof to his landlord, or his bailiff or receiver, under penalty of forfeiting the value of three years' improved or rack rent of the premises demised or holden in the possession of such tenant, to the person of whom he holds, to be recovered by action in any court of common law having jurisdiction for the amount. pp. 255, 272.

S. 210. In all cases between *landlord and tenant*, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor to whom the same is due, hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises, or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then such landlord or lessor may affix a copy thereof upon the door of any demised messuage, or in case such action in ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such writ in ejectment; and such affixing shall be deemed legal service thereof, which service or affixing such writ in ejectment shall stand in the place and stead of a demand and re-entry; and in case of judgment against the defendant for non-appearance, if it shall be made to appear to the Court where the said action is depending, by affidavit, or be proved upon the trial, in case the defendant appears, that half a year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made; and in case the lessee or his assignee or other person claiming or deriving under the said lease, shall permit and suffer judgment pp. 12, 71, 75, 117, 118, 175, 232.

to be had and recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six months after such execution executed, then and in such case the said lessee, his assignee, and all other persons claiming and deriving under the said lease shall be barred and foreclosed from all relief or remedy in law or equity, other than by bringing error for reversal of such judgment, in case the same shall be erroneous; and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease; and if on such ejectment a verdict shall pass for the defendant, or the claimant shall be nonsuited therein, then and in every such case such defendant shall have and recover his costs; provided that nothing herein contained shall extend to bar the right of any mortgagee of such lease, or any part thereof, who shall not be in possession, so as such mortgagee shall and do, within six months after such judgment obtained and execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which, on the part and behalf of the first lessee, are and ought to be performed.

pp. 117, 118.

S. 211. In case the said lessee, his assignee or other person claiming any right, title or interest, in law or equity of, in, or to the said lease, shall, within the time aforesaid, proceed for relief in any Court of equity, such person shall not have or continue any injunction against the proceedings at law on such ejectment, unless he does or shall, within forty days next after a full and perfect answer shall be made by the claimant in such ejectment, bring into Court, and lodge with the proper officer such sum or sums of money as the lessor or landlord shall in his answer swear to be due and in arrear over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the Court; and in case such proceedings for relief in equity shall be taken within the time aforesaid, and after execution is executed, the lessor or landlord shall be accountable only for so much

and no more as he shall really and *bond fide*, without fraud, deceit, or wilful neglect, make of the demised premises from the time of his entering into the actual possession thereof; and if what shall be so made by the lessor or landlord happen to be less than the rent reserved on the said lease, then the said lessee or his assignee, before he shall be restored to his possession, shall pay such lessor or landlord, what the money so by him made fell short of the reserved rent for the time such lessor or landlord held the said lands.

S. 212. If the tenant or his assignee do or shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his or their attorney in that cause, or pay into the Court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued; and if such lessee, his executors, administrators or assigns, shall, upon such proceedings as aforesaid, be relieved in equity, he and they shall have, hold, and enjoy the demised lands, according to the lease thereof made, without any new lease. pp. 72, 117,  
118.

S. 213. Where the term or interest of any tenant now or hereafter holding under a lease or agreement in writing any lands, tenements, or hereditaments for any term or number of years certain, or from year to year, shall have expired or been determined either by the landlord or tenant by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made and signed by the landlord or his agent, and served personally upon or left at the dwelling house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action of ejectment for the recovery of possession, it shall be lawful for him, at the foot of the writ in ejectment, to address a notice to such tenant or person requiring him to find such bail, if ordered by the Court or a judge, and for such purposes as are hereinafter next specified; and upon the appearance of the party on an affidavit of service of the writ and notice, it shall be lawful for the landlord producing the lease or agreement, or some counter- pp. 49, 190,  
258.

part or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises had been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid, to move the Court or apply by summons to a Judge at Chambers for a rule or summons for such tenant or person to show cause, within a time to be fixed by the Court or judge on a consideration of the situation of the premises, why such tenant or person should not enter into a recognizance by himself and two sufficient sureties in a reasonable sum conditioned to pay the costs and damages which shall be recovered by the claimants in the action; and it shall be lawful for the Court or judge upon cause shown, or upon affidavit of the service of the rule or summons in case no cause shall be shown, to make the same absolute in the whole or in part, and to order such tenant or person, within a time to be fixed, upon a consideration of all the circumstances, to find such bail, with such conditions, and in such manner as shall be specified in the said rule or summons, or such part of the same so made absolute; and in case the party shall neglect or refuse so to do and shall lay no ground to induce the Court or judge to enlarge the time for obeying the same, then the lessor or landlord filing an affidavit that such rule or order has been made and served and not complied with, shall be at liberty to sign judgment for recovery of possession and costs of suit.

p. 191.

S. 214. Whenever it shall appear on the trial of any ejectment at the suit of a landlord against a tenant, that such tenant or his attorney hath been served with due notice of trial, the judge before whom such cause shall come on to be tried shall, whether the defendant shall appear upon such trial or not, permit the claimant on the trial after proof of his right to recover possession of the whole, or of any part of the premises mentioned in the writ of ejectment, to go into evidence of the mesne profits thereof which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same down to the time of the verdict



given in the cause, or to some preceding day to be mentioned therein; and the jury on the trial finding for the claimant shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of damages to be paid for such mesne profits; and in such case the landlord shall have judgment within the time hereinbefore provided, not only for the recovery of possession and costs, but also for the mesne profits found by the jury; provided always that nothing hereinbefore contained shall be construed to bar any such landlord from bringing any action for the mesne profits which shall accrue from the verdict, or the day so specified therein, down to the day of the delivery of possession of the premises recovered in ejectment.

22 & 23 VICT. c. 35.

S. 3. Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reservation shall, in respect of the apportioned rent or other reservation allotted or belonging to him p. 62. have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him.

S. 19. Where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then, and in every such case, the land shall descend, and the descent shall thenceforth be traced from the person last entitled to the land as if he had been the purchaser thereof. p. 166.

S. 20. The last preceding section shall be read as part of the Act "For the amendment of the law of inheritance," of the session of the third and fourth years of the reign of King William the Fourth, chapter one hundred and six. p. 166.

## 23 &amp; 24 VICT. c. 38.

p. 114.

S. 6. Where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators or assigns, shall be proved to have taken place after the passing of this Act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.

## THE COMMON LAW PROCEDURE ACT, 1860.

## 23 &amp; 24 VICT. 126.

pp. 117, 118.

S. 1. In the case of any ejectment for a forfeiture brought for non-payment of rent, the Court or a judge shall have power, upon rule or summons, to give relief in a summary manner, but subject to appeal as hereinafter mentioned, up to and within the like time after execution executed, and subject to the same terms and conditions in all respects, as to payment of rent, costs, and otherwise, as in the Court of Chancery; and if the lessee, his executors, administrators, or assigns, shall, upon such proceeding, be relieved, he and they shall hold the demised lands according to the lease thereof made, without any new lease.

## 27 &amp; 28 VICT. c. 112.

pp. 145, 148.

S. 1. No judgment, statute, or recognizance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit, or other lawful authority, in pursuance of such judgment, statute, or recognizance.

S. 2. In the construction of this Act the term "judgment" shall be taken to include registered decrees, orders of Courts of Equity and Bankruptcy, and other orders having the operation of a judgment; and the term "land" shall be taken to include all hereditaments, corporeal or incorporeal, or any interest

therein; and the term "debtor" shall be taken to include husbands of married women, assignees and bankrupts, committees of lunatics, and the heirs or devisees of deceased persons.

S. 3. Every writ or other process of execution of any such judgment, statute, or recognizance, by virtue whereof any land shall have been actually delivered in execution, shall be registered in the manner provided by an Act passed in the session of the twenty-third and twenty-fourth years of her present Majesty, intituled *An Act to further amend the law of property*, but in the name of the debtor against whom such writ or process is issued, instead of, as under the said Act, in the name of the creditor; and no other or prior registration of such judgment, statute, or recognizance shall be, or be deemed, necessary for any purpose; and no reference to any such prior registration shall be required to be made in or by the memorandum or minute of such writ or other process of execution which shall be left with the senior master of the Court of Common Pleas for the purpose of such registry. p. 149.

S. 4. Every creditor to whom any land of his debtor shall have been actually delivered in execution by virtue of any such judgment, statute, or recognizance, and whose writ or other process of execution shall be duly registered, shall be entitled forthwith, or at any time afterwards while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of his debtor's interest in such land, and every such petition may be served upon the debtor only; and thereupon the Court shall direct all such inquiries to be made as to the nature and particulars of the debtor's interest in such land, and his title thereto, as shall appear to be necessary or proper; and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the said Court with respect to sales of real estates of deceased persons for the payment of debts shall be adopted and followed, so far as the same may be found conveniently applicable. p. 149.

S. 5. If it shall appear on making such inquiries that any other debt due on any judgment, statute, or recognizance is a

charge on such land, the creditor entitled to the benefit of such charge (whether prior or subsequent to the charge of the petitioner) shall be served with notice of the said order for sale, and shall after such service be bound thereby, and shall be at liberty to attend the proceedings under the same, and to have the benefit thereof; and the proceeds of such sale shall be distributed among the persons who may be found entitled thereto, according to their respective priorities.

S. 6. Every person claiming any interest in such land through or under the debtor, by any means subsequent to the delivery of such land in execution as aforesaid, shall be bound by every such order for sale, and by all the proceedings consequent thereon.

#### THE JUDICATURE ACT, 1873.

36 & 37 VICT. c. 66.

pp. 60, 140. S. 24. In every civil cause or matter commenced in the High Court of Justice law and equity shall be administered by the High Court of Justice and the Court of Appeal respectively according to the rules following :—

p. 1. (1) If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right, which heretofore could only have been given by a court of equity, the said courts respectively, and every judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose properly instituted before the passing of this Act.

pp. 1, 142. (2) If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument or contract, or against any right, title, or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said Courts respectively, and every judge thereof, shall

give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence, in any suit or proceeding instituted in that court for the same or the like purpose before the passing of this Act.

(4) The said courts respectively, and every judge thereof, shall recognise and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing p. 1. incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognised and taken notice of the same in any suit or proceeding duly instituted therein before the passing of this Act.

(6) Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and to the other express provisions of this Act, the said courts respectively, and every judge thereof, shall recognise and give effect to all legal claims and demands, and all estates, p. 2. titles, rights, duties, obligations and liabilities existing by the common law or by any custom, or created by any statute, in the same manner as the same would have been recognised and given effect to if this Act had not passed by any of the courts whose jurisdiction is hereby transferred to the said High Court of Justice.

(7) The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either p. 2. absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

p. 217. S. 25.—(2) No claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitations.

pp. 2, 187. (5) A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

p. 149. (8) A mandamus or an injunction may be granted, or a receiver appointed, by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just; and if an injunction is asked either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable.

## REAL PROPERTY LIMITATION ACT, 1874.

37 & 38 VICT. C. 57.

pp. 196, 197, 212. S. 1. After the commencement of this act no person shall make an entry or distress or bring an action or suit to recover any land or rent but within twelve years next after the time at which the right to make such entry or distress or to bring such action or suit shall have first accrued to some person

through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress or to bring such action or suit, shall have first accrued to the person making or bringing the same.

S. 2. A right to make an entry or distress, or to bring an action or suit, to recover any land or rent shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land or rent, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such land, or in receipt of such rent. But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of these two periods shall be the longer; and if the right of any such person to make such entry or distress, or to bring any such action or suit, shall have been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have

pp. 196, 201,  
202, 211, 215.

first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit, to recover such land or rent.

pp. 197, 210,  
215, 220. S. 3. If at the time at which the right of any person to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say), infancy, coverture, idiotcy, lunacy, or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years or six years (as the case may be) hereinbefore limited shall have expired, make an entry or distress, or bring an action or suit, to recover such land or rent at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability, or shall have died (whichever of these two events shall have first happened).

pp. 197, 210. S. 4. The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this Act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims.

pp. 197, 211,  
215. S. 5. No entry, distress, action, or suit shall be made or brought by any person who at the time at which his right to make any entry or distress, or to bring an action or suit to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty years, or although the term of six years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

S. 6. When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar the



estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whosoever (other than some person entitled to such possession p. 218. or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of twelve years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twelve years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.

S. 7. When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession pp. 216, 218, or receipt, unless in the meantime an acknowledgment in 220. writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no such action or suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one

mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by from or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent ; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment with interest of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

S. 8. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent ; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

S. 9. From and after the commencement of this Act all the provisions of the Act passed in the session of the third and fourth year of the reign of his late Majesty King William the Fourth, chapter twenty-seven (except those contained in the several sections thereof next hereinafter mentioned), shall remain in full force, and shall be construed together with this Act, and shall take effect as if the provisions hereinbefore contained were substituted in such Act for the provisions contained in the sections thereof numbered two, five, sixteen, seventeen, twenty-three, twenty-eight and forty respectively (which several sections from and after the commencement of this Act shall be repealed), and as if the term of six years had been mentioned, instead of the term of ten years, in the section of the said Act numbered eighteen, and the period of twelve years had been mentioned in the said section eighteen instead of the period of twenty years; and the provisions of the Act passed in the session of the seventh year of the reign of his late Majesty King William the Fourth, and the first year of the reign of her present Majesty, chapter twenty-eight, shall remain in full force, and be construed together with this Act, as if the period of twelve years had been therein mentioned instead of the period of twenty years. pp. 193, 210, 221.

S. 10. After the commencement of this Act, no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust.

#### THE CONVEYANCING ACT, 1881.

44 & 45 VICT. c. 41.

p. 46.

S. 2 (xi). A mining lease is a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or licence for mining purposes. p. 120.

p. 120. (xv). Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having, under any Act for the time being in force, effects or results similar to those of bankruptcy; and bankrupt has a meaning corresponding to that of bankruptcy.

p. 170. S. 4 (1). Where at the death of any person there is subsisting a contract enforceable against his heir or devisee for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representatives shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.

(2). A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate.

(3). This section applies only in cases of death after the commencement of this Act.

pp. 60, 63, 76. S. 10 (1). Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

(2). This section applies only to leases made after the commencement of this Act.

pp. 60, 135. S. 11 (1). The obligation of a covenant entered into by a lessor with reference to the subject matter of a lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwith-

standing severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

(2). This section applies only to leases made after the commencement of this Act.

S. 12 (1). Notwithstanding the severance by conveyance, surrender, or otherwise of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease. pp. 60, 63.

(2). This section applies only to leases made after the commencement of this Act.

S. 14 (1). A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach. pp. 69, 120, 121.

(2). Where a lessor is proceeding by action or otherwise to

pp. 120, 123. enforce such a right of re-entry or forfeiture, the lessee may in the lessor's action, if any, or in any action brought by himself, apply to the court for relief, and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit, and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court in the circumstances of each case thinks fit.

pp. 123, 124. (3). For the purpose of this section a lease includes an original or derivative under-lease, also a grant at a fee-farm rent, or securing a rent by condition ; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns ; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

p. 124. (4). This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

p. 125. (5). For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(6). This section does not extend—

pp. 70, 119, 120. (i). To a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased ; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest ; or

(ii). In case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof.

(8) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent. pp. 69, 120.

(9) This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary. pp. 78, 125.

S. 18.—(1) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized.

(2) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have by virtue of this Act power to make from time to time any such lease as aforesaid.

(3) The leases which this section authorizes are :—

(i) An agricultural or occupation lease for any term not exceeding twenty-one years ; and

(ii) A building lease for any term not exceeding ninety-nine years. p. 135.

(4) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

(5) Every such lease shall be made to take effect in possession not later than twelve months after its date.

(6) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

(7) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(8) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

(9) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease

is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute within that time, on the land leased, an improvement for or in connection with building purposes.

(10) In any such building lease or peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

(11) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or where there are more than one, to the mortgagee first in priority, a counterpart duly executed by the lessee: but the lessee shall not be concerned to see that this provision is complied with.

(12) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

(13) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

(14) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exerciseable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

(15) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed.



(16) This section applies only in case of a mortgage made after the commencement of this Act; but the provisions thereof of any of them, may, by agreement in writing made after the commencement of this Act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this Act, so nevertheless that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

(17) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting.

S. 30.—(1) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint p. 170. personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

(2) Section four of the Vendor and Purchaser Act, 1874, and section forty-eight of the Land Transfer Act, 1875, are hereby repealed.

(3) This section, including the repeals therein, applies only in cases of death after the commencement of this Act.

S. 44. (1)—Where a person is entitled to receive out of any land, or out of the income of any land, any annual

sum, payable half yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rent-charge or otherwise, not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section, as far as these remedies might have been conferred by the instrument under which the annual sum arises, but not further.

(2) If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid.

(3) If at any time the annual sum or any part thereof is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged or any part thereof, and take the income thereof, until thereby or otherwise the annual sum, and all arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by non-payment of the annual sum, are fully paid; and such possession when taken shall be without impeachment of waste.

pp. 173, 174.

(5) This section applies only of and as far as a contrary intention is not expressed in the instrument under which the annual sum arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(6) This section applies only where that instrument comes into operation after the commencement of this Act.

S. 58.—(1) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to

p. 64.

be made with the covenantee, his heirs and assigns and shall have effect as if heirs and assigns were expressed.

(2) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators and assigns, and shall have effect as if executors, administrators, and assigns, were expressed.

(3) This section applies only to covenants made after the commencement of this Act.

S. 67.—(1) Any notice required or authorized by this Act to be served shall be in writing.

(2) Any notice required or authorized by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation without his name, or generally to the persons interested without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

p. 122.

(3) Any notice required or authorized by this Act to be served shall be sufficiently served if it is left at the last known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorized to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

(4) Any notice required or authorized by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office or counting-house, and if that letter is not returned through the post-office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

(5) This section does not apply to notices served in proceedings in the Court.

p. 126. S. 69.—(1) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

p. 126. (3) Every application to the Court shall, except where it is otherwise expressed, be by summons at Chambers.

#### THE SETTLED LAND ACT, 1882.

45 & 46 VICT. c. 38.

S. 2—(10) Mines and minerals mean mines and minerals whether already opened or in work or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting, or otherwise converting or working for the purpose of any manufacture, carrying away and disposing of mines and minerals in or under the settled land or any other land, and the erection of buildings and the execution of engineering and other works suitable for those purposes; and a mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes.

#### THE MARRIED WOMEN'S PROPERTY ACT, 1882.

45 & 46 VICT. c. 75.

p. 154. S. 1 (1)—A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.

#### THE AGRICULTURAL HOLDINGS ACT, 1883.

46 & 47 VICT. c. 61.

p. 43. S. 28. Any notice, request, demand or other instrument under this Act may be served on the person to whom it is to be given, either personally or by leaving it for him at his last known place of abode in England, or by sending it through the

post in a registered letter addressed to him there ; and if so sent by post it shall be deemed to have been served at the time when the letter containing it would be delivered in ordinary course ; and in order to prove service by letter it shall be sufficient to prove that the letter was properly addressed and posted, and that it contained the notice, request, demand or other instrument to be served.

S. 33. Where a half-year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, in the case of any such tenancy under a contract of tenancy made either before or after the commencement of this Act, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same, unless the landlord and tenant of the holding, by writing under their hands, agree that this section shall not apply, in which case a half-year's notice shall continue to be sufficient ; but nothing in this section shall extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors. pp. 36, 37.

S. 41. Where on a tenancy from year to year a notice to quit is given by the landlord with a view to the use of land for any of the following purposes :— p. 44.

- The erection of farm-labourers' cottages or other houses, with or without gardens ;
- The providing of gardens for existing farm-labourers' cottages or other houses ;
- The allotment for labourers of land for gardens or other purposes ;
- The planting of trees ;
- The opening or working of any coal, ironstone, limestone, or other mineral, or of a stone quarry, clay, sand, or gravel pit, or the construction of any works or buildings to be used in connection therewith ;
- The obtaining of brick earth, gravel or sand ;
- The making of a watercourse or reservoir ;
- The making of any road, railway, tramroad, siding, canal, or basin, or any wharf, pier, or other work connected therewith ;

and the notice to quit so states, then it shall, by virtue of this Act, be no objection to the notice that it relates to part only of the holding.

In every such case the provisions of this Act respecting compensation shall apply as on determination of a tenancy in respect of an entire holding.

The tenant shall also be entitled to a proportionate reduction of rent in respect of the land comprised in the notice to quit, and in respect of any depreciation of the value to him of the residue of the holding, caused by the withdrawal of that land from the holding, or by the use to be made thereof, and the amount of that reduction shall be ascertained by agreement or settled by a reference under this Act, as in case of compensation (but without appeal).

The tenant shall further be entitled, at any time within twenty-eight days after service of the notice to quit, to serve on the landlord a notice in writing to the effect that he (the tenant) accepts the same as a notice to quit the entire holding, to take effect at the expiration of the then current year of tenancy ; and the notice to quit shall have effect accordingly.

pp. 36, 136. S. 54. Nothing in this Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, or to any holding let to the tenant during his continuance in any office, appointment, or employment held under the landlord.

#### ALLOTMENTS AND COTTAGE GARDENS COMPENSATION FOR CROPS ACT, 1887.

50 & 51 VICT. c. 26.

In this Act :—

p. 136. S. 4. "The Metropolis" means the city of London and all parishes and places mentioned in Schedules A, B, and C, to the Metropolis Management Act, 1855.

"Allotment" means any parcel of land of not more than two acres in extent held by a tenant under a landlord and

cultivated as a garden or as a farm, or partly as a garden and partly as a farm.

"Cottage garden" means an allotment attached to a cottage.

"Holding" means an allotment or cottage-garden.

"Tenant" means the holder of a holding under a landlord for any term, and includes the legal personal representative of a deceased tenant.

"Landlord" means the person for the time being entitled to receive the rents and profits of any holding.

"Person" includes a body of persons and a corporation aggregate or sole.

"Contract of tenancy" means the letting of land for any term.

"Determination of tenancy" means the cesser of a contract of tenancy by effluxion of time or from any other cause.

The designations of landlord and tenant shall, for the purposes of this Act, continue to apply to the parties to a contract of tenancy until the conclusion of any proceedings taken under this Act on the determination of a tenancy.

## THE COUNTY COURTS ACT, 1888.

51 & 52 VICT. c. 43.

S. 56. All personal actions, where the debt, demand, or damage claimed is not more than fifty pounds, whether on balance of account or otherwise, may be commenced in the Court; and all such actions shall be heard and determined in a summary way according to the provisions of this Act: Provided always that, except as in this Act provided, the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question, or for any libel or slander, or for seduction, or for breach of promise of marriage. p. 268.

S. 59. All actions of ejectment, where neither the value of the lands, tenements, or hereditaments, nor the rent payable in respect thereof, shall exceed the sum of fifty pounds by the pp. 268—270,  
275.

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year, may be brought and prosecuted in the court of the district in which the lands, tenements, or hereditaments are situate; provided that the defendant in any such action of ejectment, or his landlord, may, within one month from the day of service of the summons, apply to a judge of the High Court at chambers for a summons to the plaintiff to show cause why such action should not be tried in the High Court on the ground that the title to lands or hereditaments of greater annual value than fifty pounds would be affected by the decision in such action; and on the hearing of such summons the judge of the High Court, if satisfied that the title to other lands would be so effected, may order such action to be tried in the High Court, thereupon all proceedings in the court in such action shall be discontinued.

p. 268.

S. 60. A judge shall have jurisdiction to try any action in which the title to any corporeal or incorporeal hereditaments shall come in question where neither the value of the lands, tenements, or hereditaments in dispute, nor the rent payable in respect thereof, shall exceed the sum of fifty pounds by the year, or in case of an easement or licence, where neither the value nor reserved rent of the lands, tenements, or hereditaments in respect of which the easement or licence is claimed, or on, through, over, or under which such easement or licence is claimed, shall exceed the sum of fifty pounds by the year.

pp. 274—279.

S. 138. When the term and interest of the tenant of any corporeal hereditament, where neither the value of the premises nor the rent payable in respect thereof shall have exceeded fifty pounds by the year, and upon which no fine or premium shall have been duly paid, shall have expired, or shall have been determined, either by the landlord or the tenant, by notice to quit, and such tenant, or any person holding or claiming by, through, or under him, shall neglect or refuse to deliver up possession accordingly, the landlord may enter a plaint, at his option, either against such tenant, or against such person so neglecting or refusing, in the court of the district in which the premises lie, for the recovery of the same, and thereupon a summons shall issue to such tenant or such person so neglecting or refusing; and if the



defendant shall not at the time named in the summons show good cause to the contrary, then on proof of his still neglecting or refusing to deliver up possession of the premises, and of the yearly value and rent of the premises, and of the holding and of the expiration or other determination of the tenancy, with the time and manner thereof, and of the title of the plaintiff, if such title has accrued since the letting of the premises, and of the service of the summons if the defendant shall not appear thereto, the judge may order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff either forthwith or on or before such day as the judge shall think fit to name; and if such order be not obeyed, the registrar, whether such order can be proved to have been served or not, shall, at the instance of the plaintiff, issue a warrant authorising and requiring the bailiff of the court to give possession of such premises to the plaintiff. In any such plaint against a tenant the plaintiff may add a claim for rent or mesne profits, or both, down to the day appointed for the hearing, or to any preceding day named in the plaint, so as the same shall not exceed fifty pounds.

S. 139. When the rent of any corporeal hereditament, where neither the value of the premises nor the rent payable in respect thereof exceeds fifty pounds by the year, shall for one half year be in arrear, and the landlord shall have right by law to re-enter for the non-payment thereof, he may, without any formal demand for re-entry, enter a plaint in the court of the district in which the premises lie for the recovery of the premises, and thereupon a summons shall issue to the tenant, the service whereof shall stand in lieu of a demand and re-entry, and if the tenant shall, five clear days before the return day of such summons, pay into court all the rent in arrear and the costs, the action shall cease; but if he shall not make such payment, and shall not at the time named in the summons show good cause why the premises should not be recovered, then, on proof of the yearly value and rent of the premises, and of the fact that one half year's rent was in arrear before the plaint was entered, and that no sufficient distress was then to be found on the premises to countervail such arrear,

pp. 232, 274—  
279.

and of the landlord's power to re-enter, and of the rent being still in arrear, and of the title of the plaintiff if such title has accrued since the letting of the premises, and of the service of the summons if the defendant shall not appear thereto, the judge may order possession of the premises mentioned in the plaint to be given by the defendant to the plaintiff on or before such day, not being less than four weeks from the day of hearing, as the judge shall think fit to name, unless within that period all the rent in arrear and the costs are paid into court ; and if such order be not obeyed, and such rent and costs are not so paid, the registrar shall, whether such order can be proved to have been served or not, at the instance of the plaintiff, issue a warrant authorising and requiring the bailiff of the court to give possession of such premises to the plaintiff, and the plaintiff shall, from the time of the execution of such warrant, hold the premises discharged of the tenancy, and the defendant, and all persons claiming by, through, or under him, shall, so long as the order of the court remains unreversed, be barred of all relief.

p. 279.

S. 140. Where any summons for the recovery of a tenement as is hereinbefore specified shall be served on or come to the knowledge of any sub-tenant of the plaintiff's immediate tenant, such sub-tenant being an occupier of the whole or of a part of the premises sought to be recovered, he shall forthwith give notice thereof to his immediate landlord, under penalty of forfeiting three years' rack rent of the premises held by such sub-tenant to such landlord, to be recovered, whatever the amount thereof, by such landlord by action in the Court from which such summons shall have issued, and such landlord, on the receipt of such notice, if not originally a defendant, may be added or substituted as a defendant to defend possession of the premises in question.

p. 279.

S. 141. A summons for the recovery of a tenement may be served like ordinary summons to appear to plaintiffs in the Court, and if the defendant cannot be found, and his place of dwelling shall either not be known, or admission thereto cannot be obtained for serving any such summons, a copy of the summons shall be posted on some conspicuous part of the premises

sought to be recovered, and such posting shall be deemed good service on the defendant.

S. 142. Any warrant to a bailiff to give possession of a tenement shall justify the bailiff named therein in entering upon the premises named therein, with such assistants as he p. 279. shall deem necessary, and in giving possession accordingly; but no entry upon any such warrant shall be made except between the hours of nine in the morning and four in the afternoon.

S. 143. Every such warrant shall, on whatever day it may be issued, bear date on the day next after the last day named by the judge in his order for the delivery of possession of the p. 280. premises in question, and shall continue in force for three months from such date and no longer, but no order for delivery of possession need be drawn up or served.

S. 144. It shall not be lawful to bring any action or prosecution against the judge or against the registrar of the Court by whom such warrant as aforesaid shall have been issued, or against any bailiff or other person by whom such warrant may p. 280. be executed or summons affixed, for issuing such warrant, or executing the same respectively, or affixing such summons, by reason that the person by whom the same shall be sued out had not lawful right to the possession of the premises.

S. 145. Where the landlord at the time of applying for such warrant as aforesaid had lawful right to the possession of the premises, or of the part thereof so held over as aforesaid, neither the said landlord nor his agent, nor any other person acting in his behalf, shall be deemed to be a trespasser by reason merely of any irregularity or informality in the mode of pp. 277, 280. proceeding for obtaining possession under the authority of this Act, but the party aggrieved may, if he think fit, bring an action for such irregularity or informality, in which the damage alleged to be sustained thereby shall be specially laid, and may recover full satisfaction for such special damage with costs of the action. Provided that if the special damage so laid be not proved, the defendant shall be entitled to a verdict, and that if proved, but assessed at any sum not exceeding five shillings, the plaintiff shall recover no more costs than damages, unless

the judge before whom the trial shall have been held shall certify that in his opinion full costs ought to be allowed.

p. 276. S. 186. In construing this Act or any future Act relating to County Courts, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned shall have or include the meanings following:—"Landlord" shall be understood to mean the person entitled to the immediate reversion of the lands, or, if the property be holden in joint tenancy, co-parcenary, or tenancy in common, shall be understood to mean any one of the persons entitled to such reversion.

#### TENANTS COMPENSATION ACT, 1890.

53 & 54 VICT. c. 57.

p. 136. S. 1. This Act shall be construed as one with the Agricultural Holdings Act, 1883, and the Allotments and Cottage Gardens Compensation for Crops Act, 1887 (in this Act referred to as the principal Acts) and this Act may be cited as the Tenants Compensation Act, 1890.

S. 2. Where a person occupies land under a contract of tenancy with the mortgagor, whether made before or after the passing of this Act, which is not binding on the mortgagee of such land, then—

p. 136. (2) Before the mortgagee deprives the occupier of possession of the land otherwise than in accordance with the said contract, he shall give to the occupier six months' notice in writing of his intention so to deprive him, and if he so deprives him, compensation shall be due to the occupier for his crops and for any expenditure upon the land which he has made in the expectation of holding the land for the full term of his contract of tenancy, in so far as any improvement resulting therefrom is not exhausted at the time of his being so deprived, and such compensation shall be determined in like manner as compensation under the principal Acts, and shall be set off, charged, and recovered in manner before provided in this section. This sub-section shall only apply where the said contract is for a tenancy from year to year, or for a term of years not exceeding twenty-one, at a rack-rent.

## THE CONVEYANCING ACT, 1892.

55 &amp; 56 VICT. c. 13.

S. 1. This Act may be cited as the Conveyancing and Law of Property Act, 1892, and the Conveyancing and Law of Property Act, 1881, and the Conveyancing Act, 1882, and this Act shall be read together, and may be cited together as the Conveyancing Acts, 1881, 1882, and 1892.

S. 2.—(1) A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages, if any, all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor by writing under his hand, or from which the lessee is relieved under the provisions of the Conveyancing and Law of Property Act, 1881, or of this Act. p. 122.

(2) Sub-section six of section fourteen of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, sub-section six shall cease to be applicable thereto. pp. 70, 119,  
120.

(3) Sub-section two of this section is not to apply to any lease of—

- (a) Agricultural or pastoral land ;
- (b) Mines or minerals ;
- (c) A house used or intended to be used as a public-house or beer-shop ;
- (d) A house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels, not being in the nature of fixtures ;
- (e) Any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him.

p. 78. S. 3. In all leases containing a covenant, condition, or agreement against assigning, under-letting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent.

pp. 123, 124. S. 4. Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the Court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof either in the lessor's action, if any, or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease or any less term the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property upon such conditions, as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the Court in the circumstances of each case shall think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease.

pp. 23, 124. S. 5. In section fourteen of the Conveyancing and Law of Property Act, 1881, as amended by this Act, and in this Act, "lease" shall also include an agreement for a lease where the lessee has become entitled to have his lease granted, and "under-lease" shall also include an agreement for an under-lease where the "under-lessee" has become entitled to have his underlease granted, and in this Act under-lessee shall include any person deriving title under or from an under-lessee.

## THE MARRIED WOMAN'S PROPERTY ACT, 1893.

56 &amp; 57 VICT. c. 63.

S. 3. Section twenty-four of the Wills Act, 1837, shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any p. 154. separate property at the time of making it, and such will shall not require to be re-executed or re-published after the death of her husband.

## THE LOCAL GOVERNMENT ACT, 1894.

56 &amp; 57 VICT. c. 73.

S. 6.—(1) Upon the parish council of a rural parish coming into office, there shall be transferred to that council :—

(c) The powers, duties and liabilities of the overseers or of the churchwardens and overseers of the parish with p. 183. respect to—

(iii) The holding or management of parish property, not being property relating to affairs of the church or held for an ecclesiastical charity, and the holding or management of village greens, or of allotments, whether for recreation grounds or for gardens or otherwise for the benefit of the inhabitants or any of them.





# INDEX.

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## ACKNOWLEDGMENT,

to save statutes of limitation, 209, 218  
form of, 290

## ACQUIESCENCE, 217

*See* LIMITATION, STATUTES OF.

## ADMINISTRATOR,

title of, to leaseholds, 163  
    estates *pur autre vie*, 152, 163  
cannot sue before grant of administration, 163  
when barred by statutes of limitation, 200

## ADMITTANCE TO COPYHOLDS. *See* COPYHOLDS.

## ADVERSE POSSESSION, 194

## ADVOWSON,

Statutes of limitation, 223

## AGENT,

entry by, 9  
notice to quit by, 40  
notice to quit to, 42  
demand of possession by, 47  
waiver of forfeiture by, 112  
possession by, 195  
possession as, 195  
proof of authority, 236  
notice by agent of intention to proceed before justices, 281—282

## AGREEMENT FOR A LEASE,

right to possession under, 2  
effect of, 2

## ALIEN,

may take and hold land, 151

## ALLOTMENTS, 136, 285

APPEARANCE. *See* PRACTICE, COUNTY COURT.

ARBITRATION. *See* AWARD.

ASSENT TO BEQUEST,  
what constitutes, 161—162, 235

ASSIGNEE OF REVERSION,  
when he can re-enter for forfeiture, 60—66  
of part of, 63  
cannot re-enter for forfeiture incurred before assignment, 63  
in part of lands, 63

ASSIGNEE OF TERM,  
proof that occupier is, 26  
forfeiture by, 66—67  
how far bound by covenants and conditions, 81

ASSIGNMENT OF TERM,  
evidence of, 26  
forfeiture by. *See* COVENANT AGAINST ALIENATION.

ATTAINDER, 167

ATTESTING WITNESS, 154, 239, 247

ATTORNMENT,  
creates estoppel, 25—28  
arising from mistake, 30  
through misrepresentation, 30  
by mortgagor to mortgagee, 131, 132  
by tenants, to mortgagee, 134

AWARD,  
recovering possession under, 6—7  
how proved, 251—252

BANKRUPTCY,  
forfeiture on, 55, 81, 100, 101, 146, 173

BIRTHS,  
how proved, 241, 242

BREACH OF COVENANT,  
landlord must always prove, 68  
continuing breach, 92, 113, 114  
not cured by subsequent performance, 114  
how proved, 231

BUILDING COVENANTS, 101, 102  
*See COVENANTS AS TO BUILDINGS.*

CESTUI QUE TRUST. *See TRUSTEE.*

CESTUI QUE VIE,  
 covenant as to, 106

CHARITIES,  
 within protection of s. 25 of 3 & 4 Will. 4, c. 27...216  
 summary proceedings to recover property of, 286

CHURCHWARDENS AND OVERSEERS,  
 notice to quit by, 41  
 action to recover parish property, 180—183  
 property vests in them as a *quasi*-corporation, 180  
 what property vests in them, 180  
 what they must prove, 181  
 summary proceedings by, 181, 286  
 provisions of Parish Councils Act, 1894...183  
 evidence of title of, 238

COMMITTEE OF LUNATIC. *See LUNATIC.*

COMPENSATION. *See RELIEF.*

CONDITION,  
 how created, 54—55  
 forfeiture for breach of, 54—70  
 construction of, 56—57  
 precedent to liability to repair, 85  
 effect of waiver on, 114, 115

CONTINUING BREACH, 92  
 waiver, 113, 114

CONVEYANCING ACTS. *See RELIEF, FORFEITURE, AND INDEX  
 OF STATUTES.*

COPARCENERS,  
 descent from, 165  
 action by, 177, 178  
 statutes of limitation, 208  
*See JOINT TENANTS.*

COPYHOLDS,  
 surrenderee may enforce right of re-entry, 62  
 devise of, 152  
 right of trustee in bankruptcy, 173  
 title of lord of manor, 184

COPYHOLDS—*continued*.

- entry *quousque*, 184
- forfeitures, 184—186
- lord cannot enter when tenant of copyholder is in possession, 186
- waiver of forfeiture, 186
- no relief against forfeiture, 186
- title of heir-at-law, 186
- devisee of copyholds, 187
- surrenderee, 187
- admittance of person not entitled, 188
- lessee of copyholder need not be admitted, 188
- customs of descent, 188
- right to admittance barred by statutes, 197
- Statutes of Limitation apply, 197
- proof of customs, 237
  - court rolls, 237
  - admittances and surrenders, 237

## CORPORATIONS,

- notice to quit to, 42
- deeds of, 249
- ecclesiastical and eleemosynary, Statutes of Limitation, 222

## COSTS,

- in action for trespass for forcible entry, 18
- staying proceedings until costs of former action paid, 266
- costs in High Court, 267
- costs in county court, 279
- of summary proceedings before justices, 288
- security for, 258

## COUNTY COURT,

- jurisdiction of, 268
- removal of action to High Court, 269
- practice in actions of ejectment, 270—274
  - joinder of causes of action, 270
  - particulars of claim, 270
  - service of summons, 270
  - vacant possession, 270
  - confession of claim, 270
  - appearance by person not named as defendant, 271
  - notice limiting defence, 272
  - trial by jury, 273
  - expiration of plaintiff's title before return day, 273
  - execution, 273—274
- proceedings by landlord against tenant, 274—280
  - jurisdiction, 274—276
  - definition of landlord, 276
  - order not conclusive, 277

COUNTY COURT—*continued.*

- proceedings, expiration of tenancy, 276
  - determination by notice to quit, 276
  - for non-payment of rent, 277
  - execution, 278
  - trial, 279
  - costs, 279
  - warrant of possession, 279
  - protection of judges, &c., 280
  - protection of landlord, 280
- venue, 275

COURT ROLLS,  
proof of, 287

- COVENANT,
- construction of, 56, 58
  - positive or negative, 58
  - performance made impossible by statute, 59
  - running with reversion, 64
  - not running with reversion, 64
  - running with the land, 66, 67, 95

- COVENANT NOT TO ALIENATE,
- breach of, 77, 81
  - not to alienate without consent, 78
  - alienation by operation of law or compulsion, 80—81
  - how far assigns are bound, 81
  - proof of breach, 232

- COVENANT AS TO BUILDING,  
forfeiture for breach of, 101, 102

- COVENANT TO BUY FROM LESSOR,  
forfeiture for breach of, 102

- COVENANT AS TO *CESTUI QUE VIE*, 106

- COVENANT AS TO FARMING,  
forfeiture for breach of, 103, 104

- COVENANT AS TO GAME LAWS, 106

- COVENANT FOR INSPECTION BY LESSOR, 106

- COVENANT TO INSURE,  
forfeiture for breach of, 94, 95  
must be performed strictly, 95  
runs with the land, 95  
proof of breach, 231

## COVENANT AS TO MINING,

forfeiture for breach of, 104, 105

## COVENANT TO PAY RATES AND TAXES,

forfeiture for breach of, 95—100

the liability to pay rates and taxes, 95, 96

construction of covenant, 96

meaning of "rates and taxes," 96, 97

effect of subsequent statutes on the covenant, 97—98

increase of burdens, 98

extraordinary impositions, 98, 100

## COVENANT TO PAY RENT,

forfeiture for breach of, 71, 77

relief against forfeiture for, 118, 119

*See* RENT, NON-PAYMENT OF.

## COVENANT TO REPAIR,

forfeiture for breach of, 82—92

meaning and effect of, 82

extent of liability of tenant, 82

age of buildings to be considered, 83

class of buildings, 83

general condition of buildings, 83

performance of the covenant, 84

time to be allowed to tenant, 84

premises destroyed by fire, &c., 84—85

non-repair caused by third person, 85

subsequently erected buildings, 85

conditions precedent to liability, 85—86

pulling down or altering premises, 86

removing fixtures, 87

proof of want of repair, 87

notice to repair, 87

in an underlease, 88

## COVENANT AS TO RESIDENCE ON PREMISES,

forfeiture for breach of, 102

## COVENANT AS TO USER OF PREMISES,

forfeiture for breach of, 88—92

business or trade, 88—89

offensive or annoying business or trade, 89—90

user as public house, 90

in respect of public house, 91

what amounts to breach of, 91

continuing breach, 92

**CROWN,**

- recovering possession by, 7
  - by leasee of, 7
  - from, 7—8
- waiver by the crown, 112
- summary proceedings to recover crown lands, 286

**CUSTOM,**

- as to notice to quit, 37
- of descent, 169—188
- proof of customs of manor, 237

**CUSTOMARY HEIR, 169****DAMAGES,**

- when they may be claimed in action of ejectment, 260

**DEATH,**

- how proved, 241
- presumption after absence for seven years, 241
- without issue, 242

**DECLARATIONS,**

- of occupiers, 228, 229
- in pedigree cases, 244, 246

**DEEDS AND DOCUMENTS,**

- proof of attestation, 247
- execution, 248
- signature, 248
- sealing, 249
- of corporation, 249
- delivery, 249
- escrow, 249
- proof of contents, 250
- secondary evidence, 250
- notice to produce, 251
- subpoena duces tecum*, 251

**DEFENDANT,**

- who may be sued, 189

**DEMAND OF POSSESSION,**

- from tenant at will, 47, 49
- when necessary, 47
- when not necessary, 47
- how made, 47
- by agent, 47
- not necessary from tenant at sufferance, 49

DEMAND OF POSSESSION—*continued.*

- or trespasser, 49
- under C. L. P. Act, 1852, s. 213, 49
- by guardians under 59 Geo. 3, c. 12, 181

## DEMAND OF RENT, 73, 77, 235

*See* RENT, NON-PAYMENT OF.

DESCENT. *See* HEIR-AT-LAW.

## DESERTED PREMISES,

summary proceedings by landlord to recover possession of, 283—285

DETAINER. *See* FORCIBLE DETAINER.

## DEVISEE,

- action by, 151—161
- what he must prove, 151
- what may be devised, 152, 153, 199
- of copyholds, 152, 187
- estates *pur autre vie*, 152
- contingent and future estates, 153
- will speaks from death of testator, 153
- attesting witness, 155
- conveyance by testator of property devised, 156, 157
- lapsed and void devises, 157
- general devise, what it includes, 157, 158
- devise without words of limitation, 159
- devise to trustees, 160
- no lapse in certain cases, 160—161
- disclaimer of devise, 161, 165
- leaseholds, 161—163
- when barred by statutes of limitation, 199

## DIE WITHOUT ISSUE. Meaning of words, 159

## DISABILITIES,

preventing operation of statutes of limitation, 210, 211, 220

## DISCLAIMER OF DEVISE, 161, 165

## DISCLAIMER BY TENANT,

- what amounts to, 51—53
- of term of years, 52
- yearly tenancy, 52
- tenancy at will, 52
- waiver of, 53

## DISCLAIMER BY TRUSTEE IN BANKRUPTCY, 173



DISCOVERY IN ACTIONS OF EJECTMENT, 264

DISTRESS,

- insufficient distress, 76, 77, 232
- waiver of forfeiture by, 109, 110
- what amounts to a distress, 232
- time for, 235

DOCUMENTS. *See* DEEDS.

EFFLUX OF TIME, 49—51

*See* TENANCY.

ELEGIT, TENANT BY,

- what can be seized under an elegit, 145
- leaseholds, 145
- how possession obtained, 146
- what tenant by elegit must prove, 146
- effect of Bankruptcy Act, 1883...146
- effect of inquisition, 147
- return to inquisition, 147
- when tenant in possession, 148
- position of tenant by elegit, 148
- registration of writ, 148, 149
- equitable execution, 149
- how proved, 236

ENCROACHMENTS BY TENANT,

- right of landlord in respect of, 33, 34
- possession of, is possession as tenant, 195
- summary proceedings to recover when land to be inclosed, 286

ENTRY, 9, 12

- person having right may always enter, 9
- by agent, 9
- by tenant, 9
- mode of entry, 10
- effect of, 10
- ousting occupiers, 10
- determining tenancy at will, 47, 48
- to determine lease upon forfeiture, 67, 68
- mere entry does not give possession, 207
- forcible, *see* FORCIBLE ENTRY.

ENTRY, RIGHT OF, 1—4

- what it is, 1
- equitable right, 1, 2
- must be right to immediate possession, 2, 4
- enforcing, 9—12
- is devisable, 153

**ENTRY QUOUSQUE,**

for non-payment of rent or annuity, 58, 59, 174  
upon copyholds, 184, 185

**EQUITABLE RELIEF AGAINST FORFEITURE, 116, 127****EQUITABLE RIGHT TO POSSESSION, 1, 176**

legal owner must be party to the action, 1

**EQUITABLE TITLE,**

right to possession, 1, 2, 176  
descent of equitable estates, 167  
subject to Statutes of Limitation, 217

**ESCROW, 249, 250****ESTATE PUR AUTRE VIE, 152****ESTATE TAIL,**

when barred by Statutes of Limitation, 212, 213

**ESTOPPEL BY JUDGMENT FOR POSSESSION, 190, 191**

in County Court, in action to recover possession by landlord, 277

**ESTOPPEL BETWEEN LANDLORD AND TENANT,**

of tenant, 27—32  
tenant cannot dispute landlord's title, 27  
of persons coming into possession after lessee, 28  
how long it continues, 29  
in favour of successors of lessor, 29  
attornment or acknowledgment may be explained, 30  
exceptions to rule, 31  
estoppel of landlord, 32, 33  
to what premises it extends, 33  
as to encroachments by tenant, 33, 34  
of landlord from enforcing forfeiture, 112

**ESTOPPEL, LEASE BY, 33, 128****ESTOPPEL OF MORTGAGOR, 136****EVICITION,**

tenant may show eviction by title paramount, 42, 234  
waiver of forfeiture by, 111  
what amounts to, 233, 234

**EXECUTION,**

equitable execution, 149  
all persons will be turned out, 189  
writs of execution in High Court, 265  
in County Court, 273

**EXECUTOR,**

- may attest a will, 155
- assent to bequest, 161, 162, 235
- title to leaseholds, 162, 163

**EXPIRATION OF TITLE,**

- of landlord's title before action, 31, 32, 133
- after action, 32
- practice in County Court, 273

**FAILURE OF ISSUE,**

- meaning of words, 159

**FEAST DAYS,**

- old or new style, 39

**FIERI FACIAS, PURCHASER UNDER,**

- leaseholds, 146
- what he must prove, 147
- when no assignment by sheriff, 147
- when tenant in possession, 148
- equitable execution, 149

**FORCIBLE DETAINER,**

- what is, 16
- summary proceedings for, 19—21
- restitution after, 21—24
- statutes relating to, 291 *et seq.*

**FORCIBLE ENTRY, 13—21**

- action of trespass for, 13, 18
- what amounts to, 14, 15
- licence to enter by force, 15
- by several, 15
- by joint owners, 15
- who may prosecute for, 16
- may be resisted by force, 16
- indictment for, 17, 18
- summary proceedings for, 19—21
- conviction for, 20
- restitution after, 21—24
- statutes relating to, 291 *et seq.*

**FORFEITURE BY COPYHOLDER, 184—186. See COPYHOLDS.**

**FORFEITURE BY TENANT, 63—70**

- what landlord must prove, 54
- how incurred, 54
- for breach of covenant or condition, 54, 71

FORFEITURE BY TENANT—*continued.*

- on taking in execution of the term, 55, 80—81
- construction of conditions or provisos for re-entry, 56—58
- where lease to be *void*, 59, 107, 108
- who may enforce, 60—66
- by assignee of term, 66, 67
- when demised premises have been sub-divided, 67
- lease determined upon, 67
- entry to determine lease, 67—69
- effect of, 67
- landlord's right to fixtures and emblements upon, 67
- restrictions imposed by Conveyancing Acts, 69, 70, 120—122
- for non-payment of rent, 71—77
  - breach of covenant against alienation, 77—81
- on bankruptcy, 81, 100, 101
- for breach of covenant to repair, 82—92
  - as to user of premises, 88—92
- waste, 92—94
- non-insurance, 94—95
- non-payment of rates and taxes, 95—100
- for breach of building covenants, 101, 102
  - covenant to reside, 102
    - to buy from lessor, 102
  - farming covenants, 103, 104
  - mining covenants, 104, 105
  - covenant to allow lessor to inspect, 106
    - as to game, 106
    - to produce certificate as to life of *cestui que*  
*vie*, 106
- Statutes of Limitation, 202

## FORMS,

- notice to quit, 287
- notice of owner to apply to justices to recover possession, 288
- statement of claim, 288
- notice limiting defence, 289
- acknowledgment of title, 290
- application for leave to defend, 290

FRAUD. *See* CONCEALED FRAUD.

## GUARDIAN OF INFANT,

- action by, 175, 176
- guardian in socage, 175
- testamentary guardian, 175
- guardianship of Infants Act, 1886...175, 176
- may recover possession of land of infant, 176
- possession by, 196
- See* INFANT.

**GUARDIANS OF THE POOR.** *See* CHURCHWARDENS AND OVERSEERS.

**HEARSAY EVIDENCE,**  
to prove relationship, 245, 246

**HEIR-AT-LAW,**  
action by, 164—170  
Inheritance Act, 1833...164—168  
descent from last "purchaser," 164, 165  
devise to heir, 165  
heir of co-parceners, 165  
default of heirs of "purchaser," 166  
descent from brothers and sisters, 166  
ancestors can inherit, 166  
male line preferred, 167  
half-blood, 167  
attainted persons, 167  
descent as to equitable estates, 167  
estate tail, 167  
descendible interests, 168  
what claimant as heir-at-law must prove, 168  
legitimacy, 168  
customs of descent, 169, 188  
statutory exceptions to rules of descent, 169, 170  
trust estates, 170  
mortgage estates, 170  
land contracted to be sold, 170  
title to copyholds, 186  
when barred by statutes of limitation, 199  
proof of heirship, 240—247  
hearsay evidence to prove relationship, 245, 246

**HOLDING OVER BY TENANT,** 49

**INFANT,**  
will of, 154  
may sue in his own name, 176  
by next friend, 176  
*See* GUARDIAN OF INFANT.

**INHERITANCE ACT,** 1833, 164, 168

**INSURANCE.** *See* COVENANT TO INSURE.

**INTERESSE TERMINI,**  
sufficient title to maintain ejectment, 128

**INTRUSION, INFORMATION OF,** 7

## ISSUE,

failure of issue, 159, 160  
in tail, statutes of limitation, 212, 213

## JOINT-TENANTS,

action by, 177—178  
how they may sue, 177  
cannot sue each other, unless ouster, 177, 178  
possession of one not possession of other, 178  
statutes of limitation, 208

LAND TAX. *See* COVENANT TO PAY RATES AND TAXES.

## LANDLORD AGAINST TENANT, 25—34

what landlord must prove, 25  
estoppel of tenant, 27—30.  
tenant may show expiration of landlord's title, 31, 32, 133  
encroachments, 33, 34  
statutes of limitation, 202—207  
proceedings in county court, 274—280  
summary proceedings before justices, 281—285

## LANDLORD,

appearance by, 256

## LAPSED AND VOID DEVISES, 157

## LEASE,

definition under Conveyancing Act, 123

## LEASEHOLDS,

seizure under *elegit*, 145  
action by legatees of, 161, 162  
title of executors, 162  
administrators, 163  
assent to bequest of, 161, 162, 235

## LEGATEE,

of leaseholds, 161, 162  
what he must prove, 161  
assent of executor, 162, 235

## LEGITIMACY,

presumption of, 243  
how presumption rebutted, 248, 245

## LIMITATION, STATUTES OF,

- how the statutes should be construed, 198
- doctrine of adverse possession abolished, 194
- time runs from accrual of right of entry, 194
- claimant must be out of, and another in, possession, 194, 225
- possession by agent or tenant, 195
- possession of encroachments, 195
- possession by receiver, 196
- possession by guardian, 196
- possession of surface, 196
- action must generally be brought within twelve years, 196
- admittance to copyholds, 197
- when right of entry accrues after dispossession, 198
  - after discontinuance of possession, 198
  - to heir and devisee, 199
  - to remainderman, 199
  - to executor or administrator, 200
  - when claim under instrument other than will, 200
  - in respect of future estates, 200—202
  - in case of landlord, 202—207
  - for forfeiture, 202
  - on void or voidable lease, 203
  - on tenancy at will, 203—205
  - on yearly tenancy, 205
  - on leases in writing, 206
- mere entry does not give possession, 207
- continual claim does not preserve right, 207
- coparceners, joint tenants, tenants in common, 208
- entry by younger brother, 208
- acknowledgment to save statute, 209, 218
- disabilities, 210, 211, 220
- no disabilities as between mortgagor and mortgagee, 210, 220
- successive disabilities, 210
- different estates in same person, 211
- estate tail, 212, 218
- remainderman after estate tail, 212
- trustee and *cestui que trust*, 205, 214—217
- purchaser for value, 214
- trustee and *cestui que trust* out of possession, 215
- a. 25 applies only to express trusts, 214, 215
- cestui que trust* in possession, 216
- equitable rights, 217
- acquiescence, 217
- concealed fraud, 217
- mortgagor and mortgagee, 217—222
- mortgagee in possession, 218, 219, 229
- acknowledgment by mortgagee, 218, 219
- mortgagee not in possession, 220—222

**LIMITATION, STATUTES OF—*continued.***

- effect of foreclosure decree, 222
- ecclesiastical corporations sole, 222
- eleemosynary corporations sole, 222
- advowsons, 223
- right extinguished after statutory period, 224, 225
- possession during statutory period by several persons, 225
- what is payment of "rent," 225
- See* Statutes set out pp. 305, 331, 352

**LUNATIC,**

- sues in name of committee, 177
- person of unsound mind sues by next friend, 177

**MARRIAGE,**

- revocation of will by, 155
- how proved, 241, 242, 246

**MARRIED WOMAN,**

- will of, 154

**MESNE PROFITS,**

- how recovered, 190
- to date of judgment, 190
- what plaintiff must prove, 190
- possession and title must be proved, 190, 191
- possession of the defendant, 191
- from whom they may be recovered, 192
- amount of, 192

**MINES AND MINERALS,**

- covenants relating to, 104

**MONTHLY TENANCY,**

- notice to quit, 37

**MONTHS,**

- meaning of in agreement as to notice to quit, 36

**MORTGAGOR,**

- may recover possession until notice by mortgagee, 2, 134, 137
- also when re-demise to him, 130, 137
- stay of proceedings in action by mortgagee, 138, 144
- See* MORTGAGOR AND MORTGAGEE.

**MORTGAGOR AND MORTGAGEE,**

- mortgagee entitled to possession, 130
- re-demise to mortgagor, 130, 131
- mortgagor may be tenant at will to mortgagee, 130



**MORTGAGOR AND MORTGAGEE—continued.**

- attornment by mortgagor to mortgagee, 131, 132
- effect of attornment, 132
- recognition of possession of mortgagor, 133
- tenancies existing at time of mortgage, 133
- tenants let in by mortgagor after mortgage, 134—136
  - do not become tenants of mortgagee, 134
  - new tenancy to mortgagee may be created, 134—135
  - under Conveyancing Acts, 135
  - entitled to notice to quit from mortgagee in some cases, 136
- mortgagor estopped from denying title of mortgagee, 136
- mortgage of toll-houses, 137
- staying proceedings in ejectment by mortgagee, 138—144
- statutes of limitation, 217—222

**NOTICE OF WRIT.**

- tenant must give notice to landlord, 255, 272, 278

**NOTICE TO QUIT,**

- nature of, 35
- agreed notice, 35
- by common law, 36
- yearly tenancies, 36
- under Agricultural Holdings Act, 36
- meaning of "months" in agreement, 36
- by custom, 37
- weekly tenancy, 37
- monthly tenancy, 37
- quarterly tenancy, 37
- to quit at what time, 37, 38
- alternative times for quitting, 38
- may be evidence of date of commencement of tenancy, 39
- when premises entered on at different times, 39
- feast days, 39, 40
- to quit at what time, 39
- by whom it may be given, 40
- by mortgagee or mortgagor, 40, 41
- by co-owners, 41
- by churchwardens and overseers, 41
- to whom to be given, 41, 42
- to co-owners, 42
- to corporation, 42
- service of, 42, 43, 230
- upon whom to be served, 42
- service by post, 43
- time of service, 43

NOTICE TO QUIT—*continued.*

- form of, 44, 287
- must not be qualified, 44
- must be to quit *all* the premises, 44
- mistakes or omissions in, 44, 45
- effect of, 45
- waiver of, 45
- tenants of mortgagor not always entitled to, 46
- when unnecessary, 46
- may be verbal or written, 280
- how proved, 280
- "Legal" notice to quit, 276

## NOTICE TO REMEDY BREACH OF COVENANT,

- under Conveyancing Acts, 69, 70—120, 122
- what it must contain, 121
- failure to comply with, 121
- failure to give, 121
- reasonable compensation, 121, 122
- form of, 122
- service of, 122

## NOTICE TO REPAIR, 87, 88

*See* COVENANT TO REPAIR.

## OUSTER,

- by co-owner, 178

## OUTSTANDING TERM,

- defeats action, 3, 4

OVERSEERS. *See* GUARDIANS.

## OWNERSHIP,

- evidence of,
  - possession, 227
  - receipt of rent, 227
  - acts of ownership, 228
  - admissions of occupiers, 229

## PARCELS,

- how proved, 229, 280

## PARISH PROPERTY,

- action to recover, 180—183
- See* CHURCHWARDENS AND OVERSEERS.

**PARSON,**

- action by, 178, 179
- what he must prove, 178
- tenants of predecessor, 179
- presumption in favour of person in possession, 179—238
- evidence of title of, 237, 238

**PETITION OF RIGHT, 8**

**PLEADINGS. See PRACTICE.**

**POSSESSION,**

- under agreement for a lease, 2
- of copyholds, 186
- what is sufficient to prevent Statutes of Limitation running, 194, 196, 207
- of guardian is possession of infant, 196
- by agent, 196
- by receiver, 196
- of surface, 196
- of encroachments, 196
- gives devisable interest, 199
- prima facie* evidence of seisin in fee, 227

**POWER OF APPOINTMENT,**

- execution by will, 155, 158

**PRACTICE IN HIGH COURT,**

- stay of proceedings in action for non-payment of rent, 118, 119
  - by mortgagee, 138—144
- application for relief against forfeiture, 122, 123, 126
- special indorsement, 253
- service of writ, 254
- vacant possession, 254
- substituted service, 254
- notice of writ to be given by tenant to landlord, 255
- service of writ out of jurisdiction, 255
- appearance by person not named in writ, 266
  - landlord, 256
- application for leave to appear, 256
- notice limiting defence, 257
- default of appearance, 257
- summary judgment, 258
- security for costs and damages, 258
- joinder of causes of action, 259—261
- pleadings, 262
- counterclaim in actions of ejectment, 263
- default of defence, 264

**PRACTICE IN HIGH COURT—*continued.***

- defence as to part of claim, 264
- discovery, 264
- trial, 265
- execution, 265
- staying proceedings until costs of former action paid, 266
- costs, 267
- removal of action from county court to High Court, 269
- forms of pleadings and notices, 287—290

**PROBATE,**

- only proper evidence of will of leaseholds, 161, 240
- executor may commence action before, 162
- when evidence of will of realty, 240
- not evidence of death, 241

**PROVISO FOR RE-ENTRY. *See* CONDITION.**

“PURCHASER,” meaning of, 164, 166

**PURCHASER FOR VALUE,**

- when writs or orders not registered, 148, 149
- from trustee, 214
- discovery from, 264

**QUARTERLY TENANCIES,**

- notice to quit, 37

**QUOUSQUE. *See* ENTRY QUOUSQUE.**

**RATES AND TAXES. *See* COVENANT TO PAY RATES AND TAXES.**

**RECEIVER. *See* POSSESSION ; STATUTES OF LIMITATION.**

**RE-ENTRY,**

- proviso for, how construed, 56—58
- who may re-enter for forfeiture, 60—66
- effect of, 67
- See* FORFEITURE ; ENTRY.

**REGISTERS,**

- proof of entries in, 243

**RELATIONSHIP,**

- how proved, 245, 246

**RELIEF AGAINST FORFEITURE,**

- formerly in equity only, 116
- staying proceedings at law, 116
- present jurisdiction to grant, 117

**RELIEF AGAINST FORFEITURE—*continued.***

- for non-payment of rent, 118, 119
- under Conveyancing Acts, 119—127
  - in what cases, 119, 120
  - when application to be made, 122, 123
  - vesting order in favour of underlessee, 123
  - "lease," meaning of, 123, 124
  - "lessor," meaning of, 124
  - "underlessee," meaning of, 124
  - who can obtain, 124
  - to what leases it applies, 125
  - not in case of forfeiture of right of renewal, 125
  - terms imposed, 125, 126
  - how application made, 126
- equitable relief in other cases, 127
- of copyholds, 186

**REMAINDERMAN,**

- notice to quit, 41
- devisable interest, 153
- forfeiture of copyholds, 185
- Statutes of Limitation, 200, 211, 212, 213

**RENT,**

- payment or receipt, how proved, 227, 228
- receipt of, is evidence of ownership, 227
- payments which prevent operation of Statutes of Limitation, 206, 221, 225
- receipt of, by wrongful claimant, 206, 207
- non-payment of,
  - forfeiture for, 71—77
    - proviso for re-entry, or condition, necessary, 71
  - default in payment, 72
  - tender, 72
  - demand, 73, 77
  - demand by agent, 73, 74
  - what must be demanded, 74
  - when demand must be made, 74
  - where demand must be made, 74, 75
  - time for making demand, 75
  - proceedings under C. L. P. Act, 1852 ..75—77
  - half-year's rent in arrear, 76
  - no sufficient distress, 76
  - relief against forfeiture for, 118, 119
  - proceedings in county court, 277

**RENT-CHARGE,**

- ejectment by grantee of, 173—175
- powers conferred by Conveyancing Acts, 173
- no demand necessary, 174
- right to hold *quousque*, 174
- who can enter for non-payment, 174

**REPAIR.** *See* COVENANT TO REPAIR.

**RESIDENCE.** *See* COVENANT AS TO RESIDENCE.

**RESTITUTION,**

- after forcible entry or detainer, 21—24

**REVERSION,**

- severance of, 62, 63
- devisee of, may enforce right of re-entry, 64
- covenants running with, 64
- See* ASSIGNEE OF REVERSION.

**REVERSION BY ESTOPPEL,** 29, 31

**REVERSIONER,**

- proof that plaintiff is, 26
- payment of rent to, 26
- acknowledgment of title of, 26
- See* ASSIGNEE OF REVERSION; REVERSION.

**REVOCATION OF WILL.** *See* WILL.

**SATISFIED TERMS,**

- presumption of satisfaction, 3
- Satisfied Terms Act, 3, 4

**SEALING.** *See* DEEDS.

**SECONDARY EVIDENCE.** *See* DEEDS.

**SERVICE,**

- of notice to quit, 42, 43, 230
- under Conveyancing Acts, 122
- „ 59 Geo. 3, c. 12...182
- See* PRACTICE.

**SIGNATURE.\*** *See* DEEDS; WILLS.

**SMALL TENEMENTS.** *See* COUNTY COURT; SUMMARY PROCEEDINGS.

STAY OF PROCEEDINGS.

*See* COSTS ; PRACTICE ; RELIEF.

SUB-LETTING,

breach of covenant by, 77—81

SUFFERANCE. *See* TENANT AT SUFFERANCE.

SUMMARY PROCEEDINGS,

by guardians and overseers, 181—183, 286

by landlord, 281—285

upon expiration or determination of tenancy, 281

procedure, 282, 283

notice by landlord, 282

costs, 283

wrongfully obtaining warrant, 283

for deserted premises, 283—285

in what cases, 283

procedure, 284

view by justices or constable, 284

appeal, 285

premises in London, 285

to recover school premises, 285

allotment gardens, 285

encroachments on land to be enclosed, 286

premises belonging to charities, 286

Crown lands, 286

parish property, 181—183, 286

SUNRISE AND SUNSET,

how proved, 235

SURRENDER,

by act of parties, 50, 51

by operation of law, 51

of copyholds how proved, 237

TENANCY,

termination of, 25, 48

how proved, 25, 26

weekly, monthly, and quarterly, 37

commencement of, 38, 39

termination by efflux of time, 49—51

*See* DEMAND OF POSSESSION, DISCLAIMER, NOTICE TO QUIT,  
SURRENDER.

TENANT,

under an agreement, 2, 50, 128, 129

holding over, 49

action of ejectment by tenant, 128—129

entitled to possession on execution of present lease, 128

where term to commence *in futuro*, 129

W.Y.E.

D D

**TENANT—continued.**

- under void or voidable lease, 129
- of copyholds, 129
- when term taken in execution, 129
- what he must prove when plaintiff, 129
- of mortgagor before mortgage, 133
- „ after mortgage, 134—136
- of parson, 179
- must give notice of writ to his landlord, 255, 272, 278

**TENANTS IN COMMON,**

- action by, 177, 178
- statutes of limitation, 208
- See* JOINT-TENANT.

**TENANT AT SUFFERANCE, 46, 49, 131****TENANT AT WILL,**

- demand of possession, 47—49
- determination of will, 48
- disclaimer by, 52
- mortgagor in possession, 131, 133
- statutes of limitation, 208
- cestui que trust* in possession, 216
- summary proceedings against, 281

**TENANT FROM YEAR TO YEAR,**

- notice to quit, 36
- holding over, 49
- disclaimer by, 52
- statutes of limitation, 205

**TRIAL,**

- in High Court, 265
- in County Court, 273, 279

**TRUSTEE,**

- devise to, 160
- statutes of limitation, 205, 214—217
- purchaser for value from, 214
- cestui que trust* in possession, 216

**TRUSTEE IN BANKRUPTCY,**

- property of bankrupt vests in, 171
- appointment of, 171
- what property vests in, 171—172
- commencement of bankruptcy, 172
- proof of adjudication, 172
- „ „ appointment of trustee, 172
- copyholds, 173
- disclaimer by, 173



USER OF THE PREMISES. *See* COVENANT AS TO USER.

VACANT POSSESSION,  
     who should be sued when possession vacant, 189  
     how proved, 235  
     service of writ, 254, 271

VENUE,  
     in County Court action, 275

VOID OR VOIDABLE LEASE, 59, 107, 108, 203  
     *See* FORFEITURE; LIMITATION, STATUTES OF; WAIVER.

WAIVER OF DISCLAIMER, 53

WAIVER OF FORFEITURE,  
     meaning of, 107  
     void or voidable lease, 107, 108  
     what amounts to waiver, 108  
     by acceptance of rent, 108, 109  
     by distress for rent, 109, 110  
     by other acts, 110, 111  
     what acts do not operate as a waiver, 111, 112  
     by the Crown, 112  
     by an agent, 112  
     landlord must have knowledge of the forfeiture, 112  
     not after election to forfeit, 113  
     where breaches are continuing, 113, 114  
     recovery of damages is not, 114  
     waiver does not destroy condition, 114, 115  
     of copyholds, 186

WAIVER OF NOTICE TO QUIT, 45

WASTE,  
     forfeiture for, 92—94  
     voluntary, 93  
     permissive, 94

WEEKLY TENANCY,  
     notice to quit, 37

WILL,  
     of realty must be valid by the *lex loci*, 151  
     of copyholds, 152  
     speaks from death of testator, 153  
     of infants, 154  
     of married woman, 154  
     execution and attestation, 154, 155

**WILL—continued.**

- executing powers of appointment, 155, 158
- revocation by marriage, 155
  - not by presumption, 155
  - by another will or writing, 156
  - by destruction, 156
- obliterations, alterations, &c., 156
- revival of, 156
- subsequent conveyance of property devised, 156, 157
- meaning of "die without issue," &c., 159, 160
- no lapse in certain cases, 160—161
- bequest of leaseholds, 161, 162
- probate is the evidence of will of leaseholds, 161, 240
- title of executors or administrators, 162, 163
- proof of contents, 238
  - „ execution, 239
- when probate is evidence of will of realty, 240
- statutes set out, 320, 341, 377

**WITNESS.** *See* ATTESTING WITNESS.

**WRIT OF ELEGIT,**

registration of, 148

*See* ELEGIT, TENANT BY.

**WRIT OF FI. FA.** *See* FIERI FACIAS, PURCHASER UNDER.

**YEARLY TENANT.** *See* TENANT FROM YEAR TO YEAR.

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